

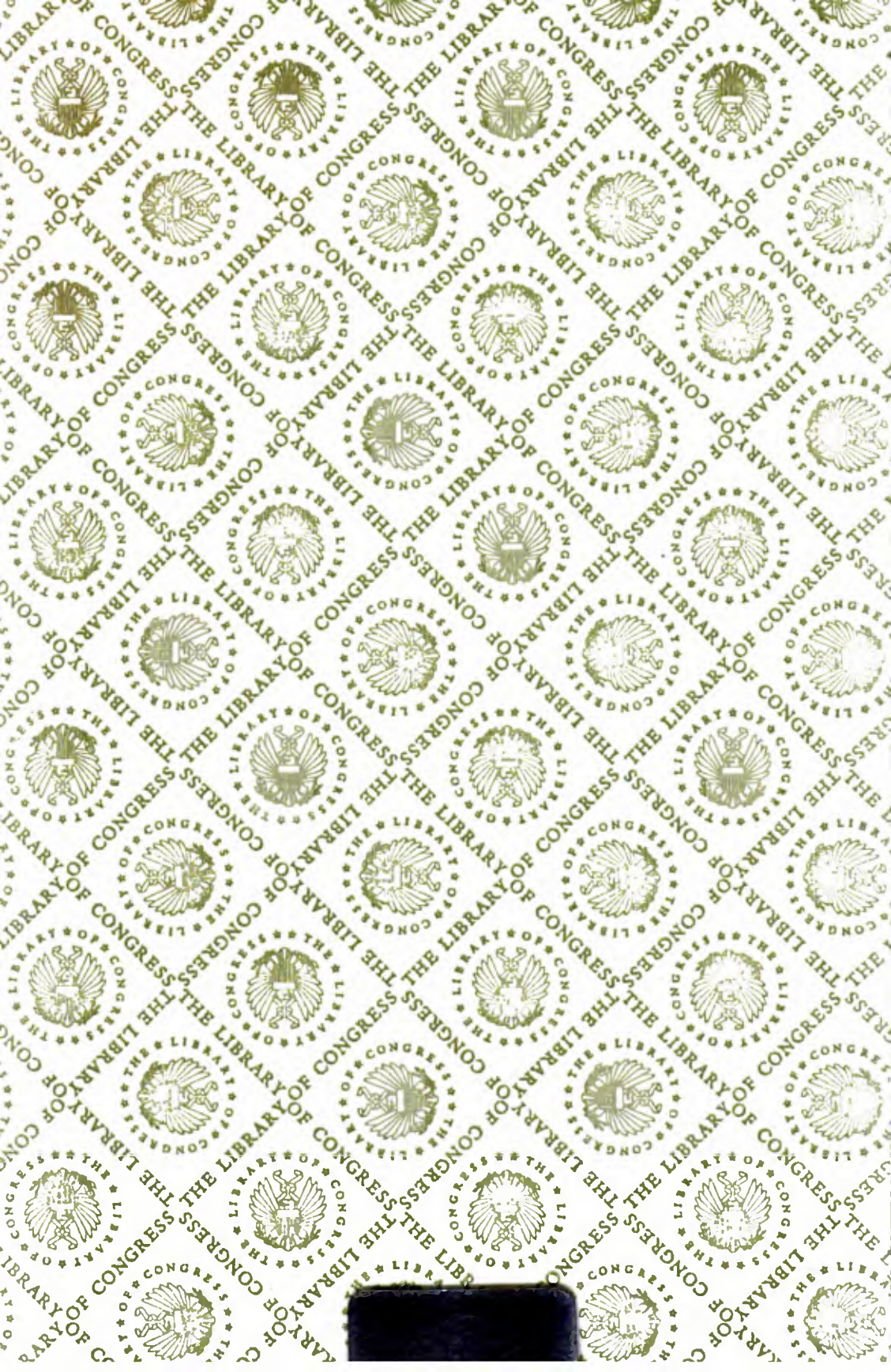
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PROHIBIT THE PHYSICAL DESECRATION OF THE FLAG OF THE UNITED STATES

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION
OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

ON

H.J. RES. 33

MARCH 23, 1999

Serial No. 28



Printed for the use of the Committee on the Judiciary

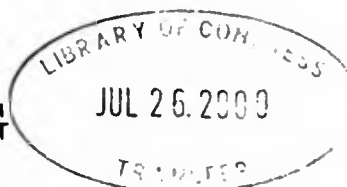
U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON : 2000

62-493

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402

ISBN 0-16-060526-1



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PROHIBIT THE PHYSICAL DESCRATION OF THE FLAG OF THE UNITED STATES

TUESDAY, MARCH 23, 1999

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to call, at 2 p.m., in Room 2141, Rayburn House Office Building, Hon. Charles T. Canady, [chairman of the subcommittee] presiding.

Present: Representatives Charles T. Canady, Chairman Henry J. Hyde, William L. Jenkins, Lindsey O. Graham, John Conyers, Jr., Barney Frank, Jerrold Nadler, Melvin L. Watt, and Maxine Waters.

Also present: Representative Robert C. Scott.

Staff present: Cathleen Cleaver, Chief Counsel; Susana Gutierrez, Clerk; Steve Pinkos, Counsel; Judiciary Committee; Sharee Freeman, Counsel, Judiciary Committee; Stephanie Peters, Minority Counsel, and Perry Apelbaum, Minority General Counsel, Judiciary Committee.

106TH CONGRESS
1ST SESSION

H.J. RES. 33

Proposing an amendment to the Constitution of the United States authorizing the Congress to prohibit the physical desecration of the flag of the United States.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 24, 1999

Mr. CUNNINGHAM (for himself, Mr. MURTHA, Mr. SWEENEY, Mr. GOODLATTE, Mr. STUMP, Mr. LATHAM, Mr. HILL of Montana, Mr. BACHUS, Mr. HERGER, Mr. YOUNG of Alaska, Mr. HYDE, Mr. CRAMER, Mr. WELDON of Pennsylvania, Mr. MCHUGH, Mr. BOEHLERT, Mr. GILMAN, Mr. REYNOLDS, Mr. HORN, Mr. GILLMOR, Mr. COX, Mr. LARGENT, Mr. DOYLE, Mr. RAHALL, Mr. PALLONE, Mr. WALSH, Mr. OXLEY, Mr. FRELINGHUYSEN, Mr. WALDEN of Oregon, Mr. SUNUNU, Mr. GIBBONS, Mr. METCALF, Mr. MENENDEZ, Mrs. CHENOWETH, Mr. BEREUTER, Mr. PORTMAN, Mr. BRADY of Texas, Mr. BURR of North Carolina, Mr. SKEEN, Mrs. JOHNSON of Connecticut, Mr. DUNCAN, Mr. BLILEY, Mr. JENKINS, Mr. LATOURETTE, Mrs. FOWLER, Mr. GOODE, Mrs. BONO, Mr. HUNTER, Mr. KING, Mr. NORWOOD, Mr. BALDACCI, Mr. ROEMER, Ms. DANNER, Ms. KAPTUR, Mr. SAXTON, Mr. BILIRAKIS, Mr. CONDIT, Mr. HOLDEN, Mr. MOAKLEY, Mr. WOLF, Mr. FRANKS of New Jersey, Mr. HANSEN, Mr. KINGSTON, Mr. BASS, Mr. RAMSTAD, Mr. WELLER, Mr. MCINTYRE, Mr. CHAMBLISS, Mr. HILLEARY, Mr. ENGLISH, Mr. KUYKENDALL, Mr. GREEN of Wisconsin, Mr. RYAN of Wisconsin, Mr. OSE, Mr. SHERWOOD, Mr. ROGAN, Mr. TERRY, Mr.

HAYES, Mr. FLETCHER, Mr. DEMINT, Mr. TOOMEY, Mr. CROWLEY, Mr. JOHN, Mr. MASCARA, Mrs. THURMAN, Mr. KILDEE, Mr. BURTON of Indiana, Mr. LUCAS of Kentucky, Mr. ISTOOK, Mr. TANCEDO, Mrs. EMERSON, Mrs. CUBIN, Mr. NEY, Mr. PEASE, Mr. TAYLOR of North Carolina, Mr. NETHERCUTT, Mr. HINOJOSA, Mr. SHOWS, Ms. PRYCE of Ohio, Mr. KNOLLENBERG, Mr. REGULA, Mr. LEWIS of California, Mr. TAYLOR of Mississippi, Mr. McNULTY, Mr. MCGOVERN, Mr. BUYER, Mr. EVERETT, Mr. ARCHER, Mr. SPENCE, Mr. CRANE, Mr. EHRLICH, Mr. COOK, Mr. TIAHRT, Mr. WATTS of Oklahoma, Mr. CALLAHAN, Mr. QUINN, Mr. GREEN of Texas, Mr. HALL of Texas, Mr. COBLE, Mr. LINDER, Mr. EWING, Mr. WATKINS, Mr. BARTLETT of Maryland, Mr. CLEMENT, Mr. TURNER, Mr. SKELTON, Mr. RADANOVICH, Mr. REYES, Ms. GRANGER, Mrs. MYRICK, Mr. GOSS, Mr. SOUDER, Mr. PETERSON of Pennsylvania, Mr. BOYD, Mr. LAHOOD, Mr. COMBEST, Mr. STEARNS, Mr. GUTKNECHT, Mr. CAMP, Mr. DIAZ-BALART, Mr. FOSSELLA, Mr. POMEROY, Mr. BARCIA, Mr. MCINTOSH, Mr. YOUNG of Florida, Mr. KANJORSKI, Mr. ROTHMAN, Mr. WHITFIELD, Mr. LOBIONDO, Mrs. KELLY, Mr. KASICH, Mr. HULSHOF, Mr. LUCAS of Oklahoma, Mr. SHIMKUS, Mr. SMITH of Washington, Mr. ORTIZ, Mr. SISISKY, Mr. STENHOLM, Mr. BONILLA, Mr. CALVERT, Mr. FROST, Mr. SALMON, Mr. BATEMAN, Mr. SMITH of New Jersey, Mr. BRYANT, Mr. SANFORD, Mr. RILEY, Mr. MALONEY of Connecticut, Mr. GANSKE, Mr. MCCRERY, Mr. BAKER, Mr. FOLEY, Mr. BISHOP, Mr. COOKSEY, Mr. DEAL of Georgia, Mr. MCCOLLUM, Mr. HEFLEY, Mr. PITTS, Mr. BILBRAY, Mr. PASCARELL, Mr. DAVIS of Virginia, Mr. DOOLEY of California, Mr. TRAFICANT, Mr. FORBES, Ms. ROS-LEHTINEN, Mrs. ROUKEMA, Mr. CHABOT, Mr. MCKEON, Mr. SIMPSON, Mrs. MCCARTHY of New York, Mr. MCINNIS, Mr. GORDON, Mr. BARRETT of Nebraska, Mr. HOBSON, Mr. COBURN, Mr. HOSTETTLER, Mr. WYNN, Mr. WAMP, Mr. MOLLOHAN, Mr. TALENT, Mr. SENSENBRENNER, Mr. BOEHNER, Mr. DELAY, Mr. JEFFERSON, Mr. BALLENGER, Mr. LEWIS of Kentucky, Mr. GRAHAM, Mr. GALLEGLY, Mr. GEKAS, Mr. CANNON, Mr. HASTINGS of Washington, Mr. WICKER, Mr. GOODLING, Mr. DICKEY, Mr. EDWARDS, Mr. WELDON of Florida, Mr. RODRIGUEZ, Mr. ROYCE, Mr. PACKARD, Mr. SCHAFER, Mr. MICA, Mr. CAMPBELL, Mr. POMBO, Mr. SHUSTER, Mr. MANZULLO, Mr. MILLER of Florida, Mr. JONES of North Carolina, Mr. PICKERING, Mr. BLUNT, Mr. LIPINSKI, Mr. WISE, Mr. SAM JOHNSON of Texas, Mr. LAMPSON, Mrs. BIGGERT, Mr. SESSIONS, Mr. CANADY of Florida, Mr. THOMPSON of Mississippi, Mr. SMITH of Michigan, Mr. BARR of Georgia, Ms. SANCHEZ, Mr. THORNBERRY, Mr. SMITH of Texas, Mr. UPTON, Mr. DOOLITTLE, Mr. HUTCHINSON, Mr. TAUZIN, Mr. NUSSLE, Ms. STABENOW, Mr. RYUN of Kansas, Mr. BENTSEN, Mr. STRICKLAND, Mr. HAYWORTH, Ms. DUNN, Mr. PETERSON of Minnesota, Mr. ROGERS, Mr. PICKETT, Mr. THUNE, Mr. BROWN of Ohio, Mr. ETHERIDGE, Mr. HOUGHTON, Mr. TOWNS, Mr. COLLINS, and Mr. MORAN of Virginia) introduced the following joint resolution; which was referred to the Committee on the Judiciary

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States authorizing the Congress to prohibit the physical desecration of the flag of the United States.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein),

SECTION 1. CONSTITUTIONAL AMENDMENT.

The following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years after the date of its submission for ratification:

"ARTICLE—

"The Congress shall have power to prohibit the physical desecration of the flag of the United States."



Mr. CANADY. The subcommittee will be in order. Let me announce at the outset that we intend to leave the doors open, because we have more people who wish to be here and observe, than

we can accommodate in the seats available. We do that so long as there is no noise that interferes with everyone's ability to hear. If the noise level from the hall, which I realize might not have anything to do with the folks who are standing there, but if the noise level from the hall interferes with our being able to hear, we will have to close the doors. But hopefully that will not happen and we can accommodate everyone. I want to thank you all for being here.

Today, the Subcommittee meets for a hearing on House Joint Resolution 33, which proposes an amendment to the Constitution of the United States authorizing Congress to prohibit the physical desecration of the flag of the United States. The language of the proposed amendment is clear and straight forward. It says the Congress shall have the power to prohibit the physical desecration of the flag of the United States.

This afternoon, we will hear from several witnesses regarding the pros and cons of this proposed Constitutional amendment. For years, 48 states and the District of Columbia had laws prescribing the physical desecration of the United States flag. However, in 1989, the Supreme Court ruled in a five to four decision, in a case called *Texas v. Johnson*, that flag desecration, as a means of public protest, is an act of free expression protected by the first amendment to the United States Constitution. This decision effectively invalidated all of the State laws that prohibited flag desecration.

Congress initially responded to the decision in *Texas v. Johnson* by passing the Flag Protection Act of 1989. That statute was specifically crafted to address concerns raised by the Supreme Court in the *Johnson* case. However, in 1990, the Supreme Court, in another five to four decision, in a case called *United States v. Eichman*, struck down the Flag Protection Act as inconsistent with first amendment free expression protections. Thus, these two Supreme Court decisions, the *Johnson* case and the *Eichman* case, deprived the American people of the ability to protect the most profound and revered symbol of our national identity. The only avenue available to Congress to protect the flag from acts of physical desecration is a constitutional amendment.

I believe, as do many of my colleagues, that both *Johnson* and *Eichman* were improperly decided. There are members, however, who are of the opinion that these cases were correctly decided. We seek their support for this amendment, as well. Under our system of government, the people, through their elected representatives, have the right and power to amend our Constitution. This is a power that should not be taken lightly. The framers very wisely established a process that makes it difficult to amend the Constitution. But the framers did recognize that there would be circumstances when amending the Constitution would be appropriate.

The amendment which we consider today has been supported by a super-majority of the House of Representatives and a majority of the United States Senate. Forty-nine States have passed resolutions calling upon Congress to pass a Flag Protection Amendment and send it back to the States for their deliberation and ratification, and an overwhelming majority of the American people want to give legal protection to our flag.

In 1995, the House of Representatives adopted a Flag Protection amendment by a vote of 312 to 120, well over the two-thirds major-

ity required for the passage of the amendment by the house. However, the Senate voted in December 1995 on this issue, and failed to reach the two-thirds majority necessary under the Constitution.

In 1997, the House again passed the Flag Protection Amendment, once again far exceeding the necessary two-thirds super-majority. The vote then was 310 to 114. Unfortunately, that amendment was never considered by the Senate during the last Congress.

In this Congress, Representatives Cunningham, Murtha and Sweeney have introduced the Flag Protection Constitutional Amendment, H.J. Res. 33, that is identical to H.J. Res. 54, which was considered by the House in the 105th Congress. There are 275 co-sponsors of H.J. Res. 33 at last count. I realize that is going up day-by-day, so we probably have more at this moment than at the last report I received. And we remain hopeful about the prospects for passage of this measure in the United States Senate.

Some argue that this amendment threatens to erode the first amendment protections that all Americans enjoy. I, of course, disagree with this assertion and I think that most Americans would also disagree. They understand that burning the flag is burning the flag, not making a speech. If this amendment becomes part of our Constitution, the first amendment will still be alive and vibrant. There is nothing in this amendment or in legislation that may be adopted subsequently that will prevent individuals from speaking out against the United States, or the Constitution, or leaders, or policies, or flag and all that the flag represents. The amendment does not prevent anyone from saying anything. It does not prevent the expression of any idea that anyone may wish to express. It will simply allow Congress to prohibit people from engaging in the act of physically desecrating the flag. The flag of the United States is one of the most sacred symbols for our Nation. It has been a symbol of our unity and is a source of strength and inspiration for millions of Americans around the world, including the men and woman of our armed services who have been willing to sacrifice their lives in defense of America and the principles she represents. The people in the United States respect and admire the flag, and an overwhelming majority of us do not believe individuals should have the right to physically desecrate this national symbol.

Mr. Watt?

Mr. WATT. Let me start by thanking the chairman for calling this hearing in order than we can engage in a dialogue. This is my first hearing as the ranking member of this subcommittee. I am especially thankful to him that he has brought an issue, as the first issue to deal with, that we all are on the same side. Now, most people are going to say, that's not so. But I think, if you think about it, you will concede that we all love our country, we all love our flag, and the vote on this issue, the position on this issue, should never, ever deteriorate into a questioning of who is patriotic and who is not patriotic. I think all of us are patriots.

After going to 3 years of law school and being in the practice of law for several years, I finally got a real working knowledge of what the first amendment was all about, when one day my senior law partner asked me if I would go to a county, several counties away from where we live, and represent some people who had been demonstrating in front of a school. They happened to be Native

Americans who were demonstrating, and they had been arrested for various sundry things involved with the demonstrating, and he sent me to represent them. When I got there and started to investigate the facts, little by little, I started to find that what the people were demonstrating about involved the fact that the Native Americans did not want their children to go to school with black children. Well, there I was. I called my senior law partner and I said to Julius Chambers, "Chambers, why would you send me to this county to represent Native Americans demonstrating against going to school with black children," and he said, "Don't you believe in the first amendment?" At that point, I started to understand what the first amendment was all about. It didn't surprise me later that that same law firm of white and black progressive lawyers represented the Ku Klux Klan when it wanted to demonstrate.

Again, we are framing that the first amendment and the Constitution is not about protecting people only that we agree with. In fact, it is more about protecting people that we disagree with, protecting speech that is out of the main stream, protecting the kind of dissident conduct that is represented by the burning of the flag.

So most of the people who we stand up and represent and fight for their rights, who assert their rights under the Bill of Rights, a lot of them are people that we disagree with. I disagree with people who burn the flag, but I will fight and defend until the end their right to speech, their right to conduct, their right to demonstrate, and that's what we all should be about. That's what this debate is about. So I hope we can keep it on that plain. We all are here for the same purpose, because we love our country, we love our flag, we love the things, the rights that the flag stands for.

Thank you, Mr. Chairman.

Mr. CANADY. Thank you, Mr. Watt.

Representative Nadler, you are recognized.

Mr. NADLER. Thank you, Mr. Chairman. Mr. Chairman, at the risk of sounding a bit old fashioned, and perhaps this is my religious education as a child, which taught me not to worship graven images, I would like to make a plea to my colleagues to put aside this annual political stunt of this amendment and stand up for what the flag represents, not for the piece of cloth that it is.

As a child, I often heard from my grandparents about the pride and anticipation of which they first viewed the American flag flying over New York Harbor as they approached Ellis Island. But that flag had meaning to them and continues to have meaning for me and for all of us, I hope, because it represents a land where the Government never has the right to tell anyone what they can or cannot say, what can or cannot believe, how they can express their opinions until that expression turns into conduct that harms others. No matter how unpopular those ideas may be, the Government cannot silence you, nor could it punish you for expressing your beliefs. Sometimes that's a difficult principle to support. It's especially difficult to support when someone does something that expresses complete contempt and disgust for those things we value most of all. That's precisely what the physical desecration of the flag communicates. The authors of this amendment freely acknowledge that they don't want that message communicated. They want it to be legal to burn the flag to express respect for it when it is

old, but they do not want it to be legal to burn the flag to express contempt for the flag and what it stands for. There is no disagreeing about that. The only question is whether we should allow our Bill of Rights to be amended for the first time in the history of the United States to be desecrated by being amended so that we can censor those expressions of contempt with which we so disagree.

Well, Mr. Chairman, most of our ancestors came here for freedom. That is what the flag means to me, and I don't think we should disgrace the flag and the memory of the great Americans who made the ultimate sacrifice in defense of the freedoms for which it stands by passing a Constitutional Amendment to limit those freedoms, which is what this so-called flag desecration amendment would do. One guiding principle of the Constitution is the principle of free thought—not free thought for those who agree with us, but freedom for the thought we hate. Justice Jackson, a former Supreme Court Justice, a great justice, once said, Freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The—substance is the right to differ as to things that touch the heart of the existing order. This flag amendment would reduce that freedom by giving the government authority to place how the individuals may express their opposition to government acts, even when they use their own property, harm no one else, and violate no other laws. Let me give you an example from the Website of the Citizens Flag Alliance, which is promoting this amendment. The American flag, on March 24, 1994, Cleveland—this is an example of an incident which they say justifies this incident; the American flag was burned during a news conference in front of police headquarters. This incident was in response to the news that the New York Supreme Court let stand an Ohio Supreme Court ruling, overturning the earlier conviction of an individual who burned a flag in protest against the Persian Gulf War. In other words, one person was opposed to the Persian Gulf War and expressed his opposition to the actions of our Country by burning the flag. The Court said he could not be convicted of that, and this other person who was so insulted that someone was not convicted for burning a flag, that to express his disgust with that court decision, he burned the flag. A little illogical, perhaps, but permitted free expression.

Now, I heard the chairman of the subcommittee say that these are acts, this is not free expression. But when one acts to express opinion, whether it means to burn a flag, which happens about four times a year in this country for free expression purposes; whether one has to burn a flag or to burn someone in effigy, or to tear up a document that you hate, that's free expression, and we should not limit it by this amendment. This amendment does not protect the flag. When we make reverence to the flag, it's not for the cloth, it's not for the design, it's for what it represents; and what it represents is liberty. This amendment tramples upon liberty, and we should not support it. And, it really desecrates, in my opinion, the memory of the soldiers who fell in defense of liberty and of the liberty that the flag represented. They didn't fall in defense of Betsy Ross' design.

Thank you, Mr. Chairman.

Mr. CANADY. Thank you, Mr. Nadler.

We welcome back the gentleman from Massachusetts, Mr. Frank, who is recognized.

Mr. FRANK. Thank you, Mr. Chairman. I am delighted to rejoin you. I will be voting against this amendment. I understand the deep revulsion that is engendered in Americans by people who burn the flag. Indeed, that is probably why they do it. Fortunately, it is only a very small handful of wholly irresponsible individuals who resort to this sort of despicable behavior. But I think it would be a mistake to give into the impulse that I think virtually everyone feels to restrain them, to do it in a way that changes our constitutional scheme.

We should be very clear in America that there is an area of personal behavior which people engage in which the government and the great majority find despicable. And that, in a paradoxical way, is one of the definitions of freedom; that we grant to the smallest minority of unpleasant, disagreeable, trouble-making individuals the right to engage in activity which the rest of us find quite despicable, as long as it does not physically intrude on the property or person, or other people.

The problem with the flag amendment is that I cannot think of a philosophy that restrains these individuals from burning the flag that doesn't lead to other things. I am struck as I read the testimony of Professor Presser, who will be testifying in favor of this. Professor Presser makes a very thoughtful argument. He, in effect, philosophically is saying, he is not singling out flag burning, although the amendment does, he is saying that we have a problem with a constitutional philosophy which, in his judgment, has gone too far in the direction of protecting individual liberty, and not understanding the right of the rest of us to impose some restrictions on that. Well, I think he phrases that case well, and that's what I disagree with.

When we are talking about the property of others, the person of others, we have a right to be very strict. But I think it would be a mistake for us to announce that the Government from time to time will prevent other people from engaging in symbolic or expressive behavior, no matter how outrageous we think it is, because the great majority of us dislike it. Because, I must say, I find flag burning outrageous, but it's not the only thing I find outrageous. I find it outrageous when people engage in violations talk. I find it outrageous when people denigrate others' religions. I find it outrageous as a Jew when people talk about the Holocaust and deny that it happened. But I would be opposed to legislation that kept those people from putting their anti-holocaust nonsense onto the Internet. I would be opposed to legislation that said you could not denounce the Catholic church or the Jewish religion. I would be opposed to legislation that outlaws racism. There's a proposal now to deny a man the right to be a member of the Bar because he's a racist. I think that is a terrible error. I think racism is quite despicable and, indeed, has caused more harm to this great country than any other single error, fundamental error, but I don't want the Government of the United States in the business of outlawing the expression of it. Acting on it, sure; acting on racism. Acting on if somebody else has got a flag and you try to interfere with that,

if you try to interfere with someone else's display of the flag, they have that right to be protected legally against you.

Cross burning has a terrible history in America. It stands for some of the most evil moments in our history. But I thought the United States Supreme Court was right when it said you cannot simply outlaw cross burning, because as vial as it is, it is simply an expression of opinion. Now that's the choice we have to make. This amendment deals only with flag burning, but if we, in fact, pass an amendment that says it's a crime to burn the flag, I do not understand how we then say to people, well, how about burning the Bible, how about desecrating crosses, how about desecrating Holocaust memorials, not physically on a Holocaust memorial, but how about denying the terrible reality of the Holocaust which inflicts enormous pain on the survivors? And I do not see where we stop. On the whole, I think we are better off if this Government says, the price of being the freest Nation in history, of which we can be very proud, is that we will from time to time have a small number of despicable people doing things that seek to provoke the rest of us into setting down tighter rules, and I don't think we ought to do that. I don't think we ought to let this vial handful, in anyway, change the principle that says we are not just the freest nation in history, but the strongest and the most coherent, and we can afford to scoff at that despicable few and not let them have the satisfaction of thinking that out of reaction to them, we amended that great document of freedom.

Thank you, Mr. Chairman.

Mr. CANADY. Chairman Hyde is recognized.

Mr. HYDE. Thank you, Mr. Chairman. I want to congratulate Mr. Frank for about as good a case as can be made for his position, and in opposition to this legislation, I think it's a very reasoned case with a good rationale behind it. I just disagree. I think it all boils down to your interpretation of flag burning as free speech or as an act, a hate crime. Now, hate crimes are something that are on our minds these days. We are asked to pass legislation to impose additional sanctions, when a crime is labeled a hate crime, so the mental state of the actor becomes important.

One of the problems with America is that one of our greatest virtues can be one of our vices, and that is, we are disunited. We have so many ethnic groups, and religious groups, and social groups, and political groups. What we disparately need is some symbol that unites us, that recognizes what we have in common, and that's what the flag does. The flag is not a piece of cloth, which the gentleman from New York said. The flag represents, as a picture on your desk of your family does, a 220 some year history of sacrifice and struggle to bring freedom and equal justice under the law to real meaning.

Almost anything can be an act of free speech. There are some things that ought to be beyond the pale. Pushing over a tombstone as an expression of free speech is absurd, ridiculous, ought to be prohibited. It's really a hate crime. There are many constitutional scholars who agree with the position of the chairman, Mr. Canady. Chief Justice Earl Warren, Justice Hugo Black, Justice Abe Forta, Chief Justice Rehnquist, Justice John Paul Stevens, Justice Sandra Day O'Connor, Justice Byron White. These are not constitutional

illiterates. They think this ought to be beyond the pale. Nobody is worshiping the flag—that would attribute a spiritual quality beyond the secular; but it can be respected as a symbol. Too many people have marched behind the flag and have clutched a triangle to their bosom at a relative's burial, not to recognize, this is a very special piece of cloth because it represents freedom and liberty and justice for all.

So I think something ought to be beyond the pale. I am for free speech and I am for protecting the language you hate. But I am not for elevating the burning of a flag to language that is a, as someone said, that's not an expression, that's a grunt. And so, I support the bill and I thank you for letting me express myself.

Mr. CANADY. Thank you, Mr. Chairman. I note the presence of the gentleman from Virginia, Mr. Scott, who is not a member of the subcommittee. Mr. Scott is, however, the emeritus ranking member of the subcommittee. The gentleman knows that it is the practice of the subcommittee to welcome the presence of all members of the committee, but only members of the subcommittee are given the privilege of asking questions and making statements. But there is an exception to every rule, and in light of the gentleman's status as the emeritus ranking member, just this once, we will recognize—

Mr. FRANK. Mr. Chairman, I am glad you would do that, but before you do that, during the last 2 years when I was the emeritus member, you never told me about that rule.

Mr. CANADY. [continuing]. Well, you should have asked. So, just this once, we will recognize the gentleman from Virginia for a statement.

Mr. SCOTT. Thank you very much, Mr. Chairman, and I appreciate your courtesy. During the last Congress, Mr. Chairman, when I was ranking member, we held hearings on nine separate constitutional amendments. We reported four of those to the House Floor, and the House passed two. Fortunately, the Senate did not pass either of those proposals.

This proposed amendment, Mr. Chairman, if enacted by Congress, and ratified, will for the first time in over two hundred years reduce our rights of free speech and expression embodied in the Bill of Rights. Those freedoms have made this country the envy of the world, and those freedoms have protected us from the kinds of upheavals over religious and political expressions that other countries experience even today. Our first amendment has been a great success, just as it is, not a failure. The first amendment is our friend, just as it is not our enemy. We should therefore resist the political temptation to lessen these freedoms for short-term gain.

At this hearing, we will likely hear much testimony on how the United States flag is a symbol for national unity, patriotism and liberty. I agree. But in a direct affront to the liberty the flag represents, the proposed resolution is seeking to prohibit a form of political expression. Just as we are free to express our feelings of love and respect for the flag by posting it at our homes and businesses, marching with it in parades, saluting and waiving it at political rallies, in our free country, those with a contrary opinion about the flag should also be free to express their feelings. Freedom is not a popularity contest. If that were the case, we would never need a

Bill of Rights. A popular expression does not need protection. In fact, protections and freedoms contemplated under the first amendment only come into play when there is a need to protect unpopular religious or political expression.

Since the proposed constitutional amendment would make certain types of expressions with the flag a crime, the practical effect of the adoption of this amendment would be the jailing of political protesters. The idea of jailing for political dissidence is obviously inconsistent with our tradition of freedom. Whether a person's thumb is pointed up or down in regard to his own feelings about the flag, should not make a difference between whether or not that person is a criminal.

I would ask the members to consider the consequences before they start chipping away at the first amendment. Some refer to this amendment as the anti-flag burning amendment. But this amendment is not trying to prohibit flag burning; the truth is that burning a flag is considered a proper way to honor the flag at ceremonies in order to dispose of it properly when it is worn out. So this amendment has nothing to do with the act of burning or other physical acts with the flag. Instead, the proponents of the amendment seek to prohibit activities and expressions with the flag with which they disagree. That's why the amendment does not prohibit burning or tearing the flag. That's why the term desecration is used. Desecration has religious connotations. In other words, this amendment would give the government the power to decide that one can burn the flag if he is thinking something nice and respectful; but that he is a criminal if he burns the flag while saying or thinking something disrespectful about it. This is absurd and in direct contravention with the whole purpose of the first amendment. The government has no business deciding which political expressions are respectful and which expressions dis the flag. And we should not be confused about the suggestion that the amendment is designed to deal with situations where someone steals a flag and burns it. Stealing property is already a crime. And when you talk about knocking over someone else's tombstone, that's obviously a crime of trespassing or something else. But what about if someone wants to knock over their own tombstone, would that be a crime?

This amendment would criminalize—

Mr. HYDE. Would the gentleman yield?

Mr. SCOTT. [continuing]. I will yield.

Mr. HYDE. Would the gentleman explain how one can knock over his own tombstone?

Mr. SCOTT. I would say, Mr. Chairman, that if you buy a tombstone before you die and knock it over, that would not be—

Mr. HYDE. Okay. Thank you for straightening that out.

Mr. SCOTT. You are welcome. This amendment would criminalize a protest—and I am glad you did correct that, Mr. Chairman, so I could explain it; this amendment would criminalize a protest where someone burns their own flag on their own property, in a disrespectful way, whether anyone else noticed at the time or not. Maybe we could reestablish the House Un-American Activities Committee, since it is now back in the news, and have people give names. Who else was there when the flag was burned and who lit the match? We have already seen the dangers of going down the

primrose path of patriotic chest-thumping legislation when we in World War II had cases compelling school children to pledge allegiance to the flag. We got so wrapped up in our drive to compel patriotism, that we lost sight of the high ideals for which our flag stands. Despite our disgust with seeing anyone forced to support a foreign dictator, we, in this Country, were passing laws that forced school children to salute and say a pledge to a flag, even if such acts were against their religion. Fortunately for the American people, the Supreme Court put an end to that coercion in the landmark case of *West Virginia State Board of Education v. Barnett*. On behalf of the majority in *Barnett*, Justice Jackson wrote, if there is any fixed star in our Constitution, it is that no official, high or petty, can prescribe what is orthodox in politics, nationalism, religion or other matters of opinion, or force citizens to confess by word or act their faith therein.

Unfortunately, this does not seem to be the case today. Instead, we are posed and anxious to prescribe what is orthodox in politics and nationalism, even when there is no evidence that flags are even being burned in protest. In fact, history reflects that the only time that flag burning occurs with any frequency, is when these constitutional amendments are being considered.

Furthermore, Mr. Chairman, the prescription required under this amendment is undefined. The text of the resolution reads that Congress shall have the power to prohibit the physical desecration of the flag of the United States. This is the same language presented in the last Congress. And even after several hearings on the subject in the House and the Senate, we still have no idea of what desecration will entail or what will constitute a flag. Thus, any criminal statute enacted under this amendment will be inherently vague and unworkable.

Mr. CANADY. Could the gentleman—

Mr. SCOTT. Mr. Chairman, if I could have one more minute?

Mr. CANADY. Please conclude as soon as you can.

Mr. SCOTT. Okay, thank you. At the hearing of the last Congress, at least one witness supporting the amendment agreed that the use of the flag in advertising could be considered desecration. How many car dealers or political candidates using flags in ads will be considered criminals, or will it depend on their political views. Based on the flag code, currently in the Federal Code, wearing a flag tie would be an offense punishable by jail under this amendment. I see at least one supporter of the amendment—at least I did at the last hearing; wearing a flag tie. Would he be a criminal, or would that be based on his political affiliation? With so many unintended consequences, I would hope that we would take a closer look at this amendment before we consider it.

In conclusion, Mr. Chairman, I would urge that this body be guided by the words of Justice Brennan when he wrote, We do not consecrate the flag by punishing its desecration, for in doing so, we dilute the freedom that this cherished emblem represents. Mr. Chairman, let us not betray the freedom our flag represents. I would urge everyone to stand up for the high ideals the flag represents by opposing this dilution of the Bill of Rights.

I thank you for your courtesy.

Mr. CANADY. Thank you. The gentleman, Mr. Jenkins.

Mr. JENKINS. Thank you, Mr. Chairman. Well, Mr. Chairman, this is the third year that I have been in the Congress, and I have been amazed by many things in those years. But I believe that there has been more amazement in my mind at the dispute about the simple language of this resolution than anything else. I tried to revert to my days in the state legislature when I looked very carefully to the words of every bill that we considered in the House of Representatives, and considering the language of this bill, which simply says that Congress shall have power to prohibit the physical desecration of the flag of the United States, I simply do not understand the arguments. Perhaps they are over my head. We speak in lofty terms of the first amendment and the Constitution, and we constantly refer to utterances of justices of the Supreme Court, and maybe it's time that we approached it from a little different perspective. There used to be a fellow on the Grand Ole Opry by the name of Little Jimmy Dickens, and he had a song that he sang about the Bible and flag. And one stands out it was, they are the backbone of our Nation and you will always find salvation with the Bible on the table and the flag upon the wall. Now those words, at least to those of us in Tennessee who are fans of the Grand Ole Opry, denote some respect for both the Bible and the Flag. And there's just absolutely no question in my mind that this flag is entitled to respect and it's entitled to the respect that would preclude its desecration, and I am very much in favor of this resolution, have been, and will continue to be.

Thank you, Mr. Chairman.

Mr. CANADY. Thank you. The gentleman from Michigan, Mr. Conyers, is recognized.

Mr. CONYERS. Thank you, Mr. Chairman.

As the longest ranking member on this committee, I have been listening to this issue since 1967. And for everybody out here in the audience, I am a veteran from the Korean conflict. I belong to at least a couple of veteran organizations. And I have been against this from the beginning, and I am going to stay against it. Now that we don't total limits—as a matter of fact, they are running away from total limits. You don't hear anybody talking about balancing the budget anymore, and yet we are still coming back talking about flag desecration. What flag desecration are you talking about? Now, let's get real. Flag burning is one of the oldest ways to solute the flag and misunderstand a constitution that you can create. The Supreme Court has reviewed this issue five different times during their lifetime. So I want to tell you that, yes, I will listen to all the arguments again. I want to commend my two congressional colleagues who have joined us here at the table, Mr. Lewis, of Georgia, and Mr. Gilchrest, and I want you to know that there hasn't been a problem made for flag desecration that requires a constitutional amendment. We have fewer than 45 reported incidents of flag burning in all of American history that I know about and, ironically, the past efforts by this body to criminalize flag burning may have only encouraged greater disrespect of the flag. So let's be careful about this cure that we come down here in 1995 and in 1997, and now in 1999, to do this little tripping number again. It didn't work before, it hasn't worked since 1931, and it's not going to work in 1999.

Now, have we considered whether efforts to protect the symbolic importance of the flag don't instead serve to undermine this great flag of ours and the constitutional principles that it represents? It has been said that a Nation's commitment to freedom of speech can be measured by the intensity of the dissent it tolerates. Well, we'll find out today in this subcommittee, this is what separates our country from places where burning a flag is it, and that's what we do not want to happen here. So the question we need to answer is whether, we, as a Congress, want to go on record for the first time in the history of this Nation as carving out this exception for the first amendment with yet another amendment.

So I ask you to join me, citizens and veterans of this Country, and let's look at this thing a little more carefully, a little bit more reasonably, and oppose this resolution which, I think, does not represent the best way of protecting the freedoms and liberties of the flag that is represented here.

Thank you, Mr. Chairman, and I return any time that is left over.

Mr. CANADY. Thank you, Mr. Conyers.

Ms. Waters?

Ms. WATERS. Thank you very much, Mr. Chairman. I made a special effort to try and get here today, because I wanted to share with many of our veterans who have come today to have their say about this resolution some things that I never said to them when I served on the Veterans' Affairs Committee.

I established a great relationship with veterans, and I can recall when I made it very clear to veterans that I may not have as many of our members had when they would come into Room 345, when the various service organizations came to talk about the budget, but I certainly have a heart.

What was interesting to me about those days was, many of the Members of Congress who would give great support to the veterans on flag burning, we could not get to support more money in the budget to deal with veterans' affairs and make it truly responsive to veterans who have had complaints for years that have not been resolved. We could not get those same Members to put their name on the dotted line to get more resources for cemeteries, or for hospitals. I said to veterans at one point, you watch these Members who rally you all the way up the appropriations door, and then they are not with you, but they could count on getting your support when they pull your string on the emotional issues such as flag burning. And today, I challenge the veterans in the room to say to some of the Members, who are telling you how much they love you, to get with those of us who want to increase the budget for veterans affairs, who want to do more to make sure that our hospitals have benefits and are what they should be. And I could go on and on with the issues. It is absolutely unconscionable in America that our veterans are on the street homeless, and we still have not committed the kinds of dollars that are necessary to deal with that.

And so, while flag burning is kind of a motherhood and apple pie issue for some, let's not allow the issues of resources—a lack of resources, to be clouded on this very emotional issue.

Where do I come down on this? I am probably one of the purest in terms of first amendment rights. I do not give any quota on first

amendment rights, because I understand the importance of the protection of first amendment rights to a democracy. I understand how important it is for people to be able to agree or disagree with their Government, to criticize their elected officials, to basically do whatever they think is necessary for them to do to make their point about what it is they don't like, even in our democracy, as long as they are shouting—inst a crowed room. We have a resolution that may come to the floor of Congress to condemn—maybe some of the Members of Congress who have been involved with the Right-Wing racist organization because they went to speak with them. And some people thought I automatically was going to be in support of that. I am not. As a matter of fact, the Ku Klux Klan can march outside my door every day of the week and denounce me, as long as they don't step over in my yard. It's all right. It is all right. It is all right, because in a democracy, we must do everything that we can to allow freedom of expression. That's really what it is all about. There may be a lot of things that I don't like—a lot of my colleagues I don't like—a lot of my colleagues are racists—a lot of my colleagues don't like me; but I will defend to my death the right for them to say they don't like me in any fashion that they want to, as long as they don't violate me, strike me, because if they do, they will have broken the law, and they will be taken care of.

And so I say to the veterans who are here today, we love America as much as you do and we fight for America and the right for everyone to have their say. Don't get tricked or fooled by those who will continue to pull your string on this emotional issue and at the same time, fail to stand on the floor of Congress and defend your right to have your proportionate share of resources to honor you for that which you have contributed to this country.

I yield back the balance of my time.

Mr. CANADY. Thank you. We will now go to the first panel of witnesses. We will have two panels. Our first panel consists of five Members of Congress. Representative Duke Cunningham is a primary sponsor of H.J. Res. 33 and in his fifth term representing the 51st District of California. He serves on the Appropriations Committee and, as it should be noted and as I think most of us are well aware, was a Navy fighter pilot ace in Vietnam.

We will also hear from Representative Steve Buyer, who is a veteran of the Gulf War. Representative Buyer has represented the 5th district of Indiana since 1993. He is chairman of the Armed Services Subcommittee on Military Personnel.

We will also hear from Representative John Lewis, who is in his seventh term as a member of the House of Representatives. Representative Lewis represents the people of the 5th District of Georgia. He serves on the Ways and Means Committee and is a preeminence of life's leader in America.

Representative John Sweeney is in his first term, representing the 22nd District of New York. Representative Sweeney serves on the Banking and Financial Services, Small Business, and Transportation and Infrastructure Committees. Representative Sweeney is a lead sponsor of H.J. Res. 33, picking up where his predecessor in the 22nd District of New York and our good friend, Jerry Solomon, left off.

Next, and last, we will hear from Representative Wayne Gilchrest. Representative Gilchrest is in his fourth term, representing the 1st District of Maryland and serves as a member of the Resources and Transportation and Infrastructure Committees. We welcome you.

We welcome all of you. As you know, we request that you limit your comments to no more than 5 minutes. That's not a rule that we enforce strictly, but I would encourage you to do your best to confine yourself to the 5 minutes, which will be indicated by the light, given the lateness of the hour and we have a panel of witnesses coming after you which we would like to conclude before this evening arrives.

So, with that, I will now recognize Representative Duke Cunningham.

STATEMENT OF HON. RANDY "DUKE" CUNNINGHAM, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. CUNNINGHAM. Thank you, Mr. Chairman. I would like to make an amendment to one of the things that you said. My colleague, although opposed to this particular amendment, is my good friend, Wayne Gilchrest. He was in the Army and was wounded and maybe not expected to live. He also is a Veteran and a very close friend.

Mr. CANADY. I appreciate your making that addition to my incomplete biography of my good friend, Mr. Gilchrest.

Mr. GILCHREST. If I could just remind Duke that I was in the Marines.

Mr. CUNNINGHAM. I would appreciate that not be taken out of my time.

Mr. GILCHREST. I appreciate that from Duke, but I was in the Marine Corp, Duke.

Mr. CUNNINGHAM. First of all, Mr. Chairman, I would say that I agree with many of the things that my colleagues have said, Mr. Watt, Mr. Frank, Mr. Conyers, Mr. Scott, and I do not chastise people for not supporting this as unpatriotic. I believe they have real concerns, and I respect those. That's why we all are here and why we fight for this country, because of those concerns and those rights to disagree. I would remind some of my colleagues that Chairman Hyde mentioned many of the Supreme Court Justices that fought and are exemplary in civil rights issues that also agree with this amendment. And I agree with Mr. Frank, there are many things in this country that are repugnant and are covered under the first amendment, but we shouldn't amend the Constitution for those reasons. But in the case of Mr. Watt, I would hope that in every case you would represent a case like you were asked to do. I think it is not only right, and I support that.

But this amendment does not amend the first amendment. It doesn't take away your right, Mr. Watt, to represent that particular case.

Mr. Chairman, I would tell you, and I do this sensitively, I resent Mr. Nadler's implication that this is a political stunt and I don't think my colleagues would characterize this as that. Back in 1989 with the Democrat leadership, this amendment passed 380 to 38

under a Democrat majority. For many of us this is a very, very important and heartfelt amendment. We believe in it just as strongly as you believe the other way. And to me, I think you know me by now, there are many things I disagree with some of the members on this panel, and even argue, but this is not one of them. And I would say that many of the men in the audience did fight and many of them lost good friends, and they will disagree with you on this. I would remind you that there is a movie, it's called *Glory*. It's about the 54th regiment, a black regiment, in which I think 100 percent of them were killed. There's a man in there that was shot five times, Sergeant William Curney, a black flag bearer that refused to let the American flag even touch the ground because it was that important to him and had that significance. And the gentlemen say that this is a stunt. Well, for over 200 years, there has been flag protection. And those that support State's rights, I would point out that 48 States had this amendment, and after 200 years, a narrow decision by the Supreme Court—five to four; took away that right. And that's what we are trying to restore, and I would tell my gentlemen friends and gentle ladies that 48 States had it, and 49 State legislatures and Governors have petitioned us to reinstate this. So we have the support, and when it goes before ratifications before the State, it will pass.

You know, this hearing is nice, but this is going to pass. This bill is going pass overwhelmingly with a super majority, and yet we respect the rights of those who disagree with it. I would respectfully say, Mr. Chairman, this is a very important piece of legislation. Brian Bilbray has the American flag in his office. It was a flag wrapped around his father's coffin. And if you take a look at what this flag signifies, the Star Spangled Banner, gentlemen, the last stand to ask a question; it's an important piece. It's not just, as Mr. Nadler said, a piece of cloth. We don't fight for the flag, we fight for what it represents. And the men and women that have died supporting that representation—and, yes, I agree with Mr. Frank, a lot of people died, including those in the 54th, and it has not lived up in many cases to our minorities and what they expected and fought for in that flag. We can make those changes, but this doesn't affect the first amendment.

I thank my colleagues.

[The prepared statement of Mr. Cunningham follows:]

PREPARED STATEMENT OF HON. RANDY "DUKE" CUNNINGHAM, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

The issue before the subcommittee is whether the American flag is simply a piece of cloth no more important than a dish rag, or whether the flag is a national treasure important enough to be guarded and protected. To me, this is not some detached, theoretical debate. Rather, it is real and personal.

As many of you know, I was lucky to serve my country for 20 years in the Navy. That service included two tours in Vietnam during which I was shot down over enemy territory. By the grace of God and the bravery of some Marine "helo grunts" I was rescued before being captured by the Viet Cong where I surely would have been beaten and tortured. I was willing to serve, in fact I wanted to serve, because I felt it was my duty—my responsibility—as a citizen of this country.

A nation as ethnically and culturally diverse as the United States needs an emblem to unify around. That rallying point is the American flag. It is not an exaggeration that I and thousands of others placed our lives in danger because of the beauty and significance embodied by the American flag. For those who would want to desecrate the flag—to burn or urinate on it—their actions are an attack on our

values and ideals; they are an attack on those who willingly agree to step forward and defend this nation.

Mr. Chairman, it is wrong to permit these type of acts. Flag desecration sends a disturbing and misleading message to our young folks. How is it that we instruct our children to pledge allegiance to the flag while at the same time seek to protect people who choose to destroy the national symbol of freedom and unity?

The most frequent argument I've heard against a constitutional amendment protecting the American flag is that an amendment will infringe on the cherish guarantee of free speech. My response to that argument is that free speech is not absolute; it is not without limits. Congress and the courts have placed reasonable restrictions on speech when deemed appropriate. (As an example, one cannot yell "fire" in a crowded room or kill bald eagles in order to make a statement about wildlife conservation.) It is interesting to note that we have found this practice to be helpful and necessary on the hallow floor of the U.S. Congress where opposing views are battled daily.

As a general rule, those who wish to desecrate the American flag do so as an act of defiance. They seek to draw attention to themselves or their issue in order to make a point. I certainly support the energetic exchange of opposing views. As Members of Congress, we participate in that exchange everyday for it is the foundation of our democracy. However, an important distinction needs to be drawn between freedom of speech and an act performed to augment that speech. An act is not speech and thus should not be granted the same constitutional protection as speech. The courts have determined that physical acts, or "expressive conduct", may be prohibited if the prohibition does not interfere with the speaker's freedom to express those ideas by other means. A constitutional amendment to the protect the flag does *not* in anyway stop or impede an individual from expressing his or her view. Thus, HJ Resolution 33 is on firm moral and legal grounds.

Mr. Chairman and members of the committee, flag protection is not a new issue. It is, however, a critical issue for it strikes at the heart of who we are as a people and a nation. A flag protection amendment has the overwhelming support of the American people and state legislatures. I ask that you heed their calls; do what you've done in the past and move this resolution quickly through your committee so that it can be taken up on the House floor for debate and vote.

I thank you for your time and your support on what is truly an issue of national importance.

Mr. CANADY. Mr. Buyer.

STATEMENT OF STEVE BUYER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF INDIANA

Mr. BUYER. Thank you, Mr. Chairman, Mr. Watt, my former colleagues of the Judiciary Committee.

The legislation before us today would amend the Constitution to empower Congress to enact legislation to protect Old Glory from desecration. The American flag is a mighty symbol, not only to the citizens of this great Nation, but also to those abroad who see it flying at our embassies or on the ships of our Naval fleet. It represents the freedom of our people, the courage of those who have defended it, and the resolve of our people to protect our freedoms from all enemies, foreign and domestic. This is not an issue about what people can say about the flag, the United States or its leaders at any given time. The rights under the first amendment are fully protected. The issue is that the flag, as a symbol of our Nation, is so revered that Congress has a right and an obligation to prohibit its willful and purposeful desecration. It is the conduct that is the focus. We are not a repressive society. The citizens of the United States have more freedoms than any other people in the history of the world. However, these freedoms come with responsibility, and we, as representatives of our constituents, have responsibilities, as well. We are charged with the responsibility as shown by our oath of office to protect and defend the Constitution of the United States. We are also charged with protecting not only the freedoms

that make our country great, but the symbols which those freedoms represent, as well. It is no coincidence that when foreigners wish to criticize America, they burn the American flag. I am sure we all remember seeing these images of the flag being burned at the Embassy in Iran; it was torn from its pole and burned in the street. Why did they burn the flag? Because they recognized, as do the witnesses here today and many who are in attendance at this hearing, that the flag is not just some piece of cotton or nylon with its pretty colors; the flag is the embodiment of all that is good about America. It embodies the freedoms of the Constitution, the pride of our citizens and the honor of our soldiers, sailors, airmen and Marines, not all of whom made it back home.

Across the river here is the memorial of the valiant efforts of our soldiers to raise the flag at Iwo Jima. It was not just a piece of cloth that rose on that day over 50 years ago, it was the physical embodiment of all of us as Americans that we treasure and the freedoms that we enjoy. It's the triumph of liberty over totalitarianism and the duty that we have to pass the torch of liberty onto our children.

I will agree with my colleague, Duke Cunningham, that I will even ask those who support this amendment, do not judge someone's level of patriotism whether they support or do not support this amendment. I was rather stunned by some comments here to think that those of us, as members, who are supporters of the Constitutional amendment are somehow pulling the strings of individuals that are here. As I turn and look at these men and woman who are very brave and have represented our Country in many different distant battlefields, who am I to somehow even possess the arrogance to think that I could somehow pull their strings. I am humbled just to be in their presence.

You see, those who serve their Country on a distant battlefield see life in the dimension which the protected may never know. Perhaps that is a dimension that some do not understand. But answering a call to duty is the highest form of patriotism. So while the defenders of freedom must remain vigilant, you see, we are also very grateful. We are grateful for our physical, spiritual and cultural inheritance, because we understand we do not own it outright. We are merely trustee tenants for life and our moral duty is to pass that inheritance along and, if possible, improve upon it. You see, to do otherwise is selfish, and it is our endless sacrifice to consecrate one's life to the greater good beset by recurrent hopes. That is why the strongest supporters of this amendment are those who understand the dimension of the distant battlefield.

So our effort here is to improve upon our legacy for future generations. And it is with that dimension I am here to testify today.

Thank you, Mr. Chairman.

Mr. HYDE [presiding]. I thank the gentleman. The gentleman from Georgia, Mr. Lewis.

STATEMENT OF HON. JOHN LEWIS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA

Mr. LEWIS. Thank you, Mr. Chairman, Mr. Watt and other members of the Committee for providing an opportunity to testify before your Subcommittee.

I must say, Mr. Chairman and Ranking Member Watt, I consider myself a veteran of a war in America. The constitutional amendment you will be debating is a very important matter. It touches on the very foundation of our Nation. You are debating not just the future of our flag, but the future of our Constitution and our Nation's ability to tolerate the political views of those who are different from the majority.

Our flag, Old Glory, is worthy of every word of praise and respect that will be spoken in this room today. Throughout the world, the American flag symbolizes freedom, liberty and the glory of democracy. It symbolizes all that is great about America. It has flown in the face of fascism during World War II. It has flown in the face of communism during the Cold War. It has even flown on the moon. Old Glory has served as a beacon of hope and opportunity for generation upon generation, not just in the United States, but throughout the world.

For these reasons, it pains me to see Congress considering H.J. Res. 33. This legislation would succeed where fascism failed. It will succeed where communism could gain no hold. H. J. Res. 33 would restrict the liberty and freedom of American people. It would diminish our rights, our Constitution and our Nation.

The first amendment of our Constitution, Freedom of Speech, Freedom of Expression, they would be shadows of their former selves. This amendment would give Congress the power to dictate to the American people how they can and cannot express themselves. It would allow Congress to prohibit a particular expression, to outlaw a particular thought. Make no doubt about it, desecration of our flag is an expressive and political act. People do not randomly desecrate the flag. They do so in protest, to make a statement. We take offense at flag desecration for the exact reason that it is a political statement. It is an attack against all that the flag means to us: sacrifice, honor and freedom. But flag desecration is not simply a symbolic attack against freedom, it also is the exercise of freedom itself. It is an American citizen exercising the rights guaranteed by our Constitution. To outlaw the symbolic attack is to outlaw the freedom, to diminish the Constitution and the Bill of Rights, which have stood for over 200 years. For all of its good intentions, this amendment is not worthy of a great nation. A great nation does not flinch when some rabble-rouser burns the flag. A great nation does not suppress the right of its citizens to criticize the government. You cannot legislate respect, or honor, or dignity. Respect, honor and dignity must be earned. Our Nation, our Constitution and our people have earned praise and respect. As a symbol of the United States of America, so has our flag. Our flag is worthy of the emotion it stirs deeps within us. It is worthy of reverence. And our flag is worthy to stand by itself against attacks of those who will seek to denigrate it and all that it stands for.

Is our flag so weak that it cannot withstand public desecration and attack? Is our flag so weak that we must pass laws to protect it? No, our flag is greater than that.

My colleagues and members of this committee, to truly honor our flag and all that it stands for, you must reject H. J. Res. 33, you must embrace not a symbol of freedom, but freedom itself. To do otherwise is to make the flag stronger than the people and the Na-

tion it represents. For the sake of our people, our freedoms and our Constitution, I urge you to reject this well-meaning, but ultimately harmful, amendment.

Thank you, Mr. Chairman, and I will give back my time.

[The prepared statement of Mr. Lewis follows:]

PREPARED STATEMENT OF HON. JOHN LEWIS, A REPRESENTATIVE IN CONGRESS FROM
THE STATE OF GEORGIA

Thank you Chairman Canady and Ranking Member Watt, for providing me the opportunity to testify before your subcommittee. The Constitutional Amendment you will be debating is a very important matter that touches on the very foundation of our nation. You are debating not just the future of our flag, but the future of our Constitution and our nation's ability to tolerate the political views of those who differ from the majority.

Our flag, Old Glory, is worthy of every word of praise and respect that will be spoken in this room today. Throughout the world, the American flag symbolizes freedom, liberty and the glory of democracy. It symbolizes all that is great about America. It has flown in the face of fascism during World War II. It has flown in the face of communism during the Cold War. It has even flown on the moon. Old Glory has served as a beacon of hope and opportunity for generation upon generation—not just in the United States—but throughout the world.

For these reasons, it pains me to see Congress considering H.J. Res. 33. This legislation would succeed where fascism failed. It would succeed where communism could gain no hold. H.J. Res. 33 would restrict the liberty and freedom of the American people. It would diminish our rights, our Constitution and our nation. The First Amendment of our Constitution—freedom of speech, freedom of expression—they would be shadows of their former selves.

This amendment would give Congress the power to dictate to the American people how they can and cannot express themselves. It would allow Congress to prohibit a particular expression—to outlaw a particular thought.

Make no doubt about it—the desecration of our flag is an expressive and political act. People do not randomly desecrate the flag—they do so in protest—to make a statement. We take offense at flag desecration for the exact reason that it is a political statement. It is an attack against all that the flag means to us—sacrifice, honor and freedom.

But flag desecration is not simply a symbolic attack against freedom—it also is the exercise of freedom itself. It is an American citizen exercising the rights guaranteed by our Constitution. To outlaw this symbolic attack is to outlaw the freedom—to diminish the Constitution and Bill of Rights—which have stood for over two hundred years.

For all its good intentions, this amendment is not worthy of a great nation. A great nation does not flinch when some rabble rouser burns the flag. A great nation does not suppress the rights of its citizens to criticize the government.

You cannot legislate respect—or honor—or dignity. Respect, honor and dignity must be earned. Our nation, our constitution and our people have earned praise and respect. As the symbol of the United States of America, so has our flag. Our flag is worthy of the emotions it stirs deep within us. It is worthy of reverence. And our flag is worthy to stand—by itself—against the attacks of those who seek to denigrate it and all that it stands for.

Is our flag so weak that it cannot withstand public desecration and attack? Is our flag so weak that we must pass laws to protect it? No, our flag is greater than that.

My Colleagues, to truly honor our flag—and all that it stands for—you must reject H.J. Res. 33. You must embrace not the symbol of freedom, but freedom itself. To do otherwise is to make the flag stronger than the people—and the nation—it represents. For the sake of our people, our freedoms and our Constitution, I urge you to reject this well-meaning—but ultimately harmful—amendment.

Thank you Mr. Chairman.

Mr. HYDE. Thank you, Mr. Lewis. Representative Sweeney?

STATEMENT OF HON. JOHN E. SWEENEY, A REPRESENTATIVE
IN CONGRESS FROM THE STATE OF NEW YORK

Mr. SWEENEY. Thank you, Mr. Chairman, Ranking Member Watt, and the other members of the committee. You know, I'm the least senior member of each of you. I have not been here for the

past several debates on this issue, but I am proud to be here today. And I'm proud to be here today at this time to talk to you about the importance of this amendment. I am proud, not only because this amendment represents the substantial will of the people of our great Nation, I am proud because I believe this amendment helps to begin a redefinition, if you will, of the soul of America, what this great Nation is all about. It is at a time, as my colleague, Ms. Waters, mentioned, that we have been retracting many of the commitments we have made in the past to those who have served our great country and who have put their lives in harms way. I think it's important that this amendment go forward and be approved, because I believe this is an important step forward for us as a nation as we recognize that the American flag symbolizes freedom and equal opportunity and religious tolerance and good will for other people of the world who share our aspirations. It really represents our national presence wherever Americans go. I think it's an important time as well, indeed, at a time when we are on the brink of possibly committing troops to a foreign nation again to defend our interest, to put their lives in harms way to represent our views, our freedoms, our interests in other regions of the world. Let me propose that, at that moment when those brave men and women must make that ultimate decision, those men and woman will think back and epitomize that decision that they have made in the symbol of the flag. Yes, it's important, because for more than 200 years, the American flag occupied the unique position as the consummate symbol of the United States, and I, like you, recognize that the right to free speech is the bedrock to our Country's founding. But burning a flag is not free speech. It's inexcusable conduct. It's an inexcusable act that must be put to an end now and forever. We should not protect such reprehensible behavior anymore than we should protect arsonists and vandals.

In the *Texas v. Johnson* ruling, the four dissenters stated that the government's interest in preserving the value of the flag is unrelated to the suppression of ideas that flag burners are trying to express, and they noted that a prohibition against flag desecration does not entail any interference with the speakers freedom to express his or her ideas by any other means. And according to a recent Gallup Pole, 74 percent of Americans do not believe that burning the flag is an appropriate expression of free speech.

Mr. Chairman, our flag brings people together. At a time when many forces, economic, social and political work to divide us, the flag represents the qualities that unite us. As you have noted to date, 275 members of the House of Representatives have signed on as co-sponsors for this amendment. We do not champion this cause blindly or against the will of the American people. Close to 80 percent of the American public have indicated their support for the Constitutional protection of the American flag. In addition, 49 State legislatures have passed resolutions calling on Congress to pass an amendment to protect Old Glory. Now it's our turn, as members of the 106th Congress, to carry out the will of the overwhelming majority of Americans. We must restore to the flag the respect that it is owed, as such an important symbol of our history and heritage as a great Nation.

I thank you, Mr. Chairman, and I yield back my time.

Mr. HYDE. Thank you, Mr. Sweeney. And now, Congressman Wayne Gilchrest, ex-Marine.

Mr. GILCHREST. Yes, sir. Ex-sailor up there in the chairman's seat, I think.

Mr. HYDE. That's right. I still get seasick.

STATEMENT OF HON. WAYNE T. GILCHREST, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MARYLAND

Mr. GILCHREST. I always get seasick, that's why I joined the Marine Corp.

I would like to just express my appreciation to Mr. Cunningham and certainly to Mr. Lewis for their thoughtful presentations on this most controversial issue. I would like to say that I have come to this point at this stage of my life with a very strong sense of love for this country, which instills every fiber of my being, and basically the credit of that goes to my mother, who gave birth to six sons, three of which served in combat in Vietnam. So she knows the despair and the pain and the loneliness that every combat veteran I am sure has ever felt in every corner of the earth in combat situations. So I come here today with an expression of love for the flag and our country, strong feelings for this institution, strong feelings for the idea that democracy rests to the pillars where we exchange information, we exchange thoughts and idea with a sense of tolerance for somebody else's opinion. And these are the fundamentals for the democratic institutions that we have.

I would like to quote somebody, Mr. Jenkins. And I know it's a lofty term, but we have lofty ideals, so once in a while we need lofty terms. It's from Jefferson, and he said, "On the altar of the Almighty, I have sworn eternal hostility to the forces that would bind the minds of men." Jefferson realized that the only way to defend freedom of good men was to defend the freedom of all men. The test, in fact, the only test of a government's commitment to free speech is how it deals with the most unpopular, the most offensive and the most ill-conceived of ideas, we all know what would happen to anyone who burned a flag in Cuba. We all know what would happened to anyone, as we have seen when they burned the flag at Tianamen Square in China. What is remarkable to me, however, with a sense of tolerance for somebody else's opinion, was hearing my colleagues suggest that we have something to learn from Cuba or China, that patriotism requires us to become a little bit more like oppressive regimes that we most often criticize. Throughout the Cold War years, we continually reminded ourselves that freedom was not free. One cost of freedom is eternal vigilance against those foes from without and from within. Another is vigilance against the sort of creeping majoritarianism that values freedom from insult more highly than freedom of speech. The unavoidable cost of freedom is the fact that people will use freedom in insulting and sometimes idiotic ways. The few malcontents who burn flags seek our outrage. They need it to draw attention to their causes. If we ignored their actions or maybe just threw a bucket of water on them, they would soon realize that they were wasting their time. Today, we not only give what they are doing, the outrage that they seek, but we enshrine it in the highest document in the land. We are wrapping it in a pretty precious gift, that gift,

that expensive paper is the Constitution, whose liberties were bought with the blood of our forefathers. Is this the right thing to do?

Mr. Chairman, I believe that no matter what anyone says, the House, on this issue, seems to value the work of Betsy Ross above the work of Madison and Jefferson. In my opinion, the practical effect would be to weaken both and to increase the pressure to restrict other kinds of speech. Thus, we will find ourselves cutting through the first of several swats to the Constitution to get out various devils. May God help us should that devil turn around on us. Our Nation's flag deserves every respect and every protection. And in my profound opinion, the best way to show respect for that symbol of freedom is good works, to be loving parents, competent workers, excellent school teachers, and responsible legislators. We honor those who have given the ultimate sacrifice for their country, not by simple words, but by living those lofty ideals.

I thank you, Mr. Chairman.

Mr. HYDE. I thank you, gentlemen. And I want to thank this panel. We customarily do not ask questions of Members of Congress when they testify, and so if you don't—Did you have something you wanted to say, Duke?

Mr. CUNNINGHAM. Would the chairman yield for 30 seconds?

Mr. HYDE. Surely.

Mr. CUNNINGHAM. I wanted to tell my colleague, Mr. Gilchrest, in a letter from James Madison to James Monroe, via Thomas Jefferson in the writings of Thomas Jefferson, moreover considered violation of the flag worthy of systematic and severe course of punishment.

Mr. HYDE. Very good. And, Wayne, you apparently don't want the last word. All right. You do want the last word?

Mr. GILCHREST. I will just say two very quick things. One, I am a fan of the Grand Ole Opry, and the last word reminded me of a song by Eddie Arnold, what you said, the last word in lonesome is me. That's the way I feel in this panel. Mr. Lewis is with me.

Mr. HYDE. I thank you very much, gentlemen. Thank you.

I would like to introduce each member of the second panel and we will then ask them to make their statements.

First, we will hear from Professor Stephen Presser. Professor Presser is a Raoul Berger, Professor of Legal History at Northwestern University School of Law. He also teaches in Northwestern's History Department and at the Graduate School of Management. Professor Presser is the senior author of a leading case book in American legal history and the author of a treatise on "Piercing the Corporate Veil."

Our next witness after that would be Dr. Stephan Ross. Dr. Ross is a retired staff psychologist for the City of Boston Community Schools, and as a child, Dr. Ross was held prisoner by the Nazis for 5 years in ten different death camps, including Auschwitz and Dachau. Dr. Ross was finally liberated at the age of 14 by American soldiers.

Next, the Honorable David Skaggs. Former Representative Skaggs served in Congress for 12 years, representing the 2nd District of Colorado. He was a captain in the U. S. Marine Corp. Re-

serve from 1968 to 1977. He is currently the Executive Director of the Democracy and Citizenship Program at the Aspen Institute.

Next, Bishop Carlton D. Pearson. Bishop Pearson is the presiding Bishop of more than 500 churches, and ministries throughout the Isuzu Interdenominational Fellowship, including the Higher Dimensions Family Church with a congregation in Tulsa, with more than 5,000 members. Bishop Pearson is also the founder and President of Higher Dimensions Ministries, which includes, in addition to the Family Church, Ravens Nest Feeding Ministry, the Life Alternative Crisis Pregnancy Center, Hanna's Prayer Adoption Agency, St. Dominick's Maternity Home for Unwed Mothers, a School of Ministry and a Preschool.

Douglas C. Clifton is next. He has worked at Knight Ridder Newspapers since 1970, and has been the Executive Director at the *Miami Herald* since 1991. Prior to joining Knight Ridder, Mr. Clifton served 3 years in the Army, including 1 year as an artillery officer in Vietnam.

Next, Shawntel Smith. Ms. Smith was the 1996 Ms. America, and subsequently conducted a national speaking tour entitled "School to Work, Reinventing America's Work Force." She is also a member of the National School to Work Advisory Council. Last year, Ms. Smith was added to the United States Junior Chamber of Commerce Outstanding American's List.

Next, Joseph E. Rogers. Captain Rogers was a Navy ROTC Midshipman at Marquette University and was commissioned in 1973. He completed nuclear propulsion training in 1974, and served as a submarine officer until 1978. Captain Rogers continued his Naval career as a reservist until 1997, during which time he was recalled to active duty to serve in Operation Desert Shield and Desert Storm. Captain Rogers was awarded several military awards, including the Navy Commendation Medal, two Navy Unit Commendations. Joseph Rogers graduated from Western New England College of Law in 1986 and is currently corporate counsel specializing in intellectual property for Alcatel, USA, Inc. He is a member of the Texas and Connecticut Bar and is a registered patent attorney.

And our final witness of the day will be Major General Patrick H. Brady, U.S. Army, retired. General Brady served more than 34 years in the U.S. Army and is currently Chairman of the Board of the Citizens Flag Alliance, a non-partisan confederation of organizations and individuals aligned together for the purpose of returning to the people the right to protect the flag from desecration. General Brady received the Congressional Medal of Honor and the Distinguished Service Cross for his efforts as an air ambulance pilot in Vietnam, where he evacuated more than 5,000 wounded soldiers.

A so with that distinguished lineup, we will start with you, Professor Presser. Would you push the little button, and may I also suggest respectfully that you try to hold your presentation down to 5 minutes. Your statements will be admitted into the record and will be read, I can assure you. But we have a long panel and we would like to get everyone in. Thank you Professor.

STATEMENT OF STEPHEN B. PRESSER, PROFESSOR OF LEGAL HISTORY, NORTHWESTERN UNIVERSITY

Mr. PRESSER. Thank you, Mr. Chairman. It's clear that there is nobility and honor and passion and reason on both sides of this issue. But at the end of the day, alas, only one side can prevail. Our public rests on the sovereignty of the people, and it is the American people who must ultimately decide what kind of republic we are to have. The voice of the people is pretty clear here. Never before have 49 State legislatures requested that an amendment be sent on to them for ratification. Most of the American people appear to understand that there is a difference between an intentionally outrageous act, such as mutilating, burning or desecrating on the American flag and the kind of speech protected by the first amendment. Most of the American people understand what Earl Warren, Hugo Black, Justice Rehnquist and the other dissenters in *Texas v. Johnson* understood. But flag desecration is not an act of political speech. It is, rather, in Justice Rehnquist's words, more like an inarticulate grunt. It's an act of defiance and disgust, perhaps, but it's certainly not a coherent political or social statement.

For this reason, Mr. Chairman, like you and like Mr. Canady, I don't believe that the flag protection amendment infringes the first amendment in any way. In other words, the five person majority in *Texas v. Johnson* simply got it wrong. For me, all the flag protection amendment will do is correct that error and return us to the constitutional jurisprudence that prevailed before 1989. The first amendment was in no jeopardy then, it's in no jeopardy now from this amendment.

Of course, I don't mean to suggest that no expressive conduct can ever be included in the term speech, because, after all, all speech requires some form of conduct to express. Understanding the first amendment, then, is a matter of line drawing between those acts, our constitutional guarantee a freedom of speech is designed to protect, and those acts that it is not. They are easy cases at both ends. On irritation by a candidate for public office is clearly protected, where smearing of political slogans on the Washington Monument clearly is not. Flag desecration, wilful destruction, defacement or defoulment of the one meek symbol of the Nation with the intention of provoking outrage and distress on the part of those who witness the act falls on the non-protected side of the line. We are dealing with rights here, but we mustn't lose sight of the most fundamental right of free government, itself; the right to preserve ordered liberty, which is vested in the American people.

The vast majority of those who have worked to see the enactment of this amendment and to reverse the ruling in *Texas v. Johnson* are not constitutional scholars, but I believe they have a better understanding of what the flag represents and what our republic has historically been about—many lawyers.

As you will hear for the advocates of this amendment, the flag is more than a shred of cloth. For them it is the living embodiment of the self-sacrifice of our veterans, our lost heroes in battle and our shared hopes and dreams as a Nation. The supporters of this amendment, the legal recognition of the sacred character of the flag and its protection against physical desecration is important to the national well-being in a sense of what it means to be an American.

From the Declaration of Independence onward, we understood that some things must be regarded as sacred in our society. And the flag protection amendment does no more than express that vital understanding.

The arguments in favor of the amendment I think are obvious. The advocates against it though, as I said, have nobility and reason and passion on their side too. They believe that it threatens the first amendment, because they believe that flag desecration is speech. I don't think it is. But even if it was, even forms of speech may be regulated or even forbidden in the service of other constitutional goals. Thus, one may be punished for speech that reveals our troop movements or other state secrets to enemies of the Nation. One may be sued in the courts for speech that slanders another, one can be punished for wrongly crying fire in a crowded theater, one can be sent to prison for speaking with others to reveal inside information or trade secrets.

Finally, there has never been any doubt that reasonable time, place, and other restrictions can be imposed on speech of all kinds. Even if I believed that flag desecration was speech that followed in the amber to the first amendment, I would support the flag protection amendment as no more than a traditional balancing of the right of free speech with the rights and responsibilities of American citizenship.

If our public is to endure, rights must always be balanced with responsibilities, just as Mr. Frank indicated. Liberty must also be accompanied by duty. For the past few decades, our constitutional jurisprudence, I do believe, has moved far in the direction of expanding rights, and occasionally we have forgotten about the corresponding responsibilities. Just such a forgetting took place in 1989 in *Texas v. Johnson*. The flag protection amendment is an effort to remember, again, what this republic is all about.

I urge you once again to approve it. Thank you, Mr. Chairman.
[The prepared statement of Professor Presser follows:]

PREPARED STATEMENT OF STEPHEN B. PRESSER, PROFESSOR OF LEGAL HISTORY,
NORTHWESTERN UNIVERSITY

My name is Stephen Presser, I am the Raoul Berger Professor of legal history at Northwestern University School of Law, I have been serving for several years as a Constitutional issues consultant to the Citizens Flag Alliance, and I appear before you today in order to testify in support of H.J. Res. 33, the proposed "Flag Protection" Amendment, and against any further attempts to protect the flag by Congressional statute. I believe that this is my third appearance before this subcommittee to testify in favor of such an Amendment. My goal in this testimony, as it was before, is both to indicate the persuasive arguments in favor of the Amendment, and to address some of the objections that were raised ten years ago, four years ago, and are still being raised against the Amendment.

You will be hearing from other proponents of the Amendment who will be more eloquent in its support than I will be, and who will address their special feeling for the American flag and the need to protect it from desecration. The desire for the Amendment is also evident, from the fact that the Amendment has repeatedly garnered so many sponsors in the House and Senate and has been the subject of favorable resolutions in 49 state legislatures. I do not know of any other Amendment in American history that has ever achieved that kind of support prior to its passage. I believe that I can best serve the subcommittee by making some comments about the legal background that gives rise to a need for the Amendment, by underscoring why a federal statute could not do the job of protecting the flag, and by addressing the general arguments of legal scholars and commentators who have criticized this Amendment effort.

I. The Need for the Flag Protection Amendment

The need for the Amendment, as you know, results from the Supreme Court's surprising decision in *Texas v. Johnson* (1989). There, by a bare five to four majority, the Court declared that flag-burning was speech protected by the First Amendment, and could therefore not be banned by the federal government or by state legislatures. This decision outraged the four dissenters and many Americans, who thought that the defendant Gregory Johnson's conduct (incinerating the flag after repeatedly chanting "Red White and Blue, we spit on you") was an outlandish act of arson, and not the kind of speech James Madison had in mind when he and his colleagues were drafting what became the First Amendment.

Chief Justice Rehnquist, writing for the dissenters in *Johnson*, wondered how legislation protecting the flag that had been on the books in most states for many decades, without objection, could have suddenly become impermissible. Rehnquist, after observing that several of the Court's greatest champions of the First Amendment, including Hugo Black and Earl Warren, thought that the flag could be protected from desecration, noted that the protection of the national symbol ought to be seen as no threat to the Constitution as a matter of common sense, perhaps, rather than as a matter of sophisticated First Amendment jurisprudence. But common sense is now too often in short supply in Constitutional discourse. The obvious, it would seem, now has to be embarrassed in the academy and in the courts, where gorgeous subtleties and refined analysis cloaked in balancing tests and multi-level tiers of scrutiny conceal what is essentially result-oriented reasoning. The majority's opinion in *Texas v. Johnson* is one of the worst examples of this sad tendency.

In *Texas v. Johnson* the majority even conceded that if the government had a "compelling interest" in preserving the symbolic value of the flag it could override any First Amendment protections, but the court then declared, in effect, *that the only permissible "symbolic value" of the flag was that it stood for the right to express oneself in opposition to the flag and desecrating the flag was simply a manifestation of this right*. Thus the government could have no "compelling interest" in preventing flag desecration, *since flag desecration simply confirmed the symbolic value of the flag*. As you will hear from other witnesses, the Supreme Court had no basis for declaring that preserving this sort of license—it can't really be called liberty—was the only symbolic value of the flag.

Following *Texas v. Johnson*, in a wave of public outrage, the Congress passed a statute forbidding flag desecration. The statute was supposedly drafted in neutral language, in order to seem as not to be attacking speech. Several leading constitutional scholars, most prominently Lawrence Tribe of Harvard, had advised Congress that a statute could solve the problem, and that the First Amendment and statutory flag protection could co-exist. Several of us told the Congress that only an Amendment could authorize flag desecration statutes, since the Court was disposed to read any prohibition on conduct involving the flag as an infringement of the First Amendment. We were proved right when, a year after *Johnson*, in *U.S. v. Eichman*, the Supreme Court found the new statute unconstitutional.

Sadly, there appear to be a few distinguished members of the United States Congress who still wrongly believe a statute protecting the flag could be held Constitutional and who resist an Amendment for that reason. *If there is one clear principle in current Supreme Court jurisprudence, however, it is that the Supreme Court will hold that any statute dealing with the flag is interference with purported First Amendment freedoms, because a majority of the Court has indicated that it will find any statutory attempt to protect the flag to be an impermissible endorsement of a view that the court has said the government has no compelling interest in promoting.*

Justice Brennan made as clear as he could in his opinion in *Eichman* that even a facially-neutral statute *would be construed as an attempt to silence speech expressing a particular point of view* (that of those seeking to express contempt for the flag by desecrating it). Any statute seeking to protect the flag, then, would thus be construed as a violation of the First Amendment, because, in this misguided construction, it would be construed as a Congressional statute interfering with freedom of speech. Justice Brennan made clear that in the case of such statutes the Court would look beyond form to substance, and would declare them unconstitutional.

In *Eichman* Brennan stated that "Although the Flag Protection Act [the 1990 statute] contains no content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the Government's asserted interest [protecting the flag] is 'related to the suppression of free expression.'" *United States v. Eichman*, 496 U.S. 310, 315 (1990). A Court manifesting Brennan's view would find any act passed with a desire to protect the Flag to be an unconstitutional infringement of freedom of speech.

Some current advocates of a statute have mistakenly believed that they could formulate one that would come within the "fighting words" exception to the broad

sweep of First Amendment protection. They are wrong. Not only is that doctrine increasingly under attack, and unlikely to furnish much support, but in light of the Supreme Court's unwillingness in *Texas v. Johnson* to allow breach of the peace justifications for flag protection legislation, and its concomitant insistence that normal state criminal statutes are sufficient to protect persons against harm caused by "fighting words" uttered in connection with the flag, it is inconceivable that any statute could now survive the Constitutional scrutiny of a kind that the Court used in *Eichman*.

Justice Brennan has retired from the Court, but Justice Souter, who replaced him, has First Amendment views similar to his, and Justices Scalia and Kennedy, who concurred with Brennan in *Eichman* would take the same position in a future case. Justices Ginsburg and Breyer have first Amendment views close to those of Justices Souter, Kennedy, and Scalia, and would make up the necessary five votes for a majority in any future challenge to a statute. Justice O'Connor was one of the dissenters in *Johnson* and *Eichman*, but since those decisions she has (with Justices Souter and Kennedy) been one of the Court's strongest proponents of stare decisis (following previously decided cases), and she might well be found in the majority rejecting future statutes. Justice Thomas's views on this question are unknown, but he has often been sympathetic to the positions taken by Justice Scalia, and he might well follow him on this matter. Justices Rehnquist and Stevens would likely find a statute constitutional if they chose to follow the reasoning in their dissenting opinions in *Johnson* and *Eichman*. At best then, any new statute would fall in a 5 to 4 decision, and very possibly in a 7 to 2 decision. The statutory route is simply not open to those who would protect the flag, just as it was not in 1990.

Following the failure of the statute in 1990, the proponents of the Amendment once again sought help from Congress, only to suffer defeat as the Amendment failed to garner the necessary two thirds majority in the House. The Amendment effort then returned to the grass roots, and its proponents redoubled their efforts. As you know, in 1995, the Amendment passed the House by the requisite two-thirds majority, only to fail by three votes in the Senate. During the last Congressional session, as you know, the Amendment again garnered the requisite majority in the House, through grass-roots effort, although it was never brought to the floor of the Senate for a vote. It has been reintroduced in this session, and is now before you again.

II. The Arguments in Favor of the Amendment

Why then am I for this Amendment, when the Supreme Court has twice rejected the constitutionality of flag desecration, when many members of the legal academy, and many commentators in the media remain adamantly opposed to it? Why do I reject the view of those who still claim that the Flag Protection Amendment is an attempt to infringe our precious First Amendment freedoms? First, I believe that since before the 1989 Johnson decision it was widely believed that the First Amendment could properly be construed as not including within its ambit acts of flag desecration, and since that view has only been overturned by the slimmest of transient majorities on the Supreme Court, widespread public opinion, expressed in the continued grass roots desire for a Constitutional Amendment, ought to be the most relevant factor in defining the nature of our First Amendment freedoms. In other words, we have to ask the question here, who should be defining the scope of the First Amendment? Who should be determining what the word "speech" in that Amendment means?

If the American people (as indicated by the favorable resolutions in forty-nine state legislatures) feel that there is a difference between pure political speech (which the First Amendment incontrovertibly protects) and intentionally outrageous acts of arson, defecation, or other forms of destruction (which it does not), that feeling deserves deference, and a Constitutional Amendment is the proper manner in which that deference ought to be expressed. The Constitution and the Bill of Rights, after all, are acts of the sovereign people, and the sovereign people have a continuing role in the preservation and interpretation of the Constitution.

To put this another way, the current Flag Protection Amendment effort is a vital exercise in participatory democracy, in popular sovereignty, and is deserving of support for that reason alone. Popular sovereignty is the basis of our Constitutional system, and Article V, which authorizes the Amendment process, recognizes this. Where the Supreme Court has misconstrued the Constitution, the Amendment process allows the people to correct the Court's error, as was done, for example, in the case of the Thirteenth, Fourteenth, Sixteenth, and Nineteenth Amendments.

There is another manner in which the Flag Protection Amendment effort can be seen as a necessary corrective, and this brings me to what I believe is the most important reason the Amendment ought to have the support of Constitutional scholars,

and deserves passage. I believe that the Flag Protection Amendment is a small but vital step in returning us to a Constitutional path from which we have wrongly strayed, and in redressing a delicate Constitutional balance that has become dangerously skewed.

III. A Delicate Balance of Philosophies and Purposes

Our Framers understood that there were two important elements to our Constitutional tradition which we inherited from Great Britain—a liberty element and a responsibility element. Without the liberty guaranteed to us by the English Common Law, we often said at the time of the Revolution, we would be slaves, and no better than the subjects of some Asiatic potentate. Without liberty we could not hope to realize the aspirations toward religious freedom and republican government for which the United States was colonized and then, later, declared independent. But the Framers also realized that without responsibility, without order, without submission to the rule of law, there could be no protection for life, limb and property, there could be no lasting liberty. The Federal Constitution itself was drafted and adopted following the failure of the state legislatures to understand that more responsibility was needed, and that we could not enjoy the blessings of liberty without security to person and property.

To make this same point in a manner heard more generally today, it was one of the goals of the Constitution's framers to foster a sense of community among all the citizens of our republic, to secure a certain baseline of civilized behavior. It is the recognition of this goal, by the way, that has always permitted reasonable time place and manner restrictions on even the speech protected by the First Amendment. The proposed Flag Protection Amendment is quite consistent with such restrictions. If this Amendment becomes law, and Flag protection legislation is enacted, the message that flag burners, defecators, or other flag destroyers and abusers might seek to convey—that we ought to destroy the symbols that bind us together—can still be conveyed by pure speech, of course. All that will have happened will be that one particular incendiary manner of expressing similar sentiments would be restricted, in the interest of other Constitutional goals, most notably the recognition that with liberty comes responsibility, and that it is the duty of society to enforce that responsibility and to preserve order. Even if the Flag Amendment is adopted, it would still be true that our First Amendment jurisprudence would be marked by a tolerance for the expression of dissenting or even despised views, but not necessarily by a tolerance for all intentionally inflammatory actions.

Many of our judges, and the majority of the Supreme Court in the two flag decisions in particular, appear to have gone too far in embracing an individualistic constitutional jurisprudence, and to have forgotten other elements in our political and constitutional tradition. The Framers of the Constitution and the Bill of Rights were not merely a group of late 18th century John Stuart Mills, devoted solely to maximizing opportunities for the expression of individual lifestyles or sentiments. They adhered to a nearly bewildering number of governmental philosophies, chief among them what we now call classical republicanism, which was characterized by an emphasis on individual restraint, altruism and civic virtue.

Included also among the Framers, of course, were a bevy of Hobbesians who believed in the need for a strong central government to protect us from our baser instincts. Included as well were a number of evangelical theorists who sought to preserve a strong role for religion and morality in American life. There were also adherents to the Scottish Enlightenment and to the new market theories of Adam Smith. Finally, there were a number of Lockeans, committed to the protection of what they took to be individuals' rights to life, liberty, property, and the pursuit of happiness.

It is not too much to say that it was the genius of our Constitution and of much of our political history that we usually managed successfully to juggle our competing basic philosophies, to grant more individual freedom than was available in any other country, but to balance it by community-centered restraints, in order to achieve what we call ordered liberty. We thus succeeded in protecting the security of person and property, but sought still to allow our people to enjoy enough independence to realize their particular callings in the community. When the Supreme Court's majority, in its Johnson decision, created a single symbolic meaning for the flag, its supposed apotheosis of individual self-expression, it betrayed a fundamental misunderstanding of the nature of the American founding.

Thus, if there is a single message in our Constitutional history, it is probably that each time we move too far in one direction, towards unlimited liberty, or toward too restrictive order, there is a reaction, and sometimes a violent one. In recent years we have been living through a period in which this delicate balance of constitutional philosophies and purposes has gone awry. We are at a point where the personal liberty element of our tradition has, in effect, spun almost out of Constitutional con-

trol. It has now become commonplace to lament the decline in national standards and morality, but it is rarely recognized that a significant part of the problem is that many of the people and the courts have forgotten what the constitution, and perhaps even the flag, stood for. For at least the last forty years, our constitutional law has been radically reconceived as concerned only with the gratification of individual desires, and the expansion of individual license.

The erroneous notion that our basic constitutional philosophy is individual self-actualization—the mistake of the Johnson majority—has led too many courts to misconstrue the Constitution and to forget the need for community responsibility and self-restraint. This kind of Constitutionalism makes the First Amendment and the Fourteenth Amendment into tails wagging the whole Constitutional dog, and improperly uses the Bill of Rights as a club to beat back the right of the people to take some necessary steps for the preservation of ordered liberty.

IV. Consequences of Constitutional Imbalance

Ideas or the failure to remember ideas have consequences. I don't think it goes too far to say here that we should draw a lesson from recent events in America such as the riots following the first Rodney King trial several years ago, the recent explosion in the birth of children born out of wedlock, the increase in mindless and random acts of violence particularly in our schools, the Oklahoma city bombing, or even the recent widespread failure of many governmental officials, including even the President, to abide by the simplest moral principles, or perhaps even the rule of law itself. All of these, I think it can be said, are, in some ways, products of our failure, as a Constitutional society, to remember that with individual liberty ought to come basic decency and responsibility.

The Supreme Court's two decisions regarding flag burning didn't create all these problems, of course, but they are part of a jurisprudence that encourages moral chaos and irresponsibility in society. In the *Texas v. Johnson* case the five Justices in the majority were guilty of failing to be able to distinguish between the kind of liberty of speech which needs to be protected in a republic, and the kind of irresponsible and outrageous acts of arson and desecration which should be punished. The Flag Protection Amendment does no more than return us to an understanding that we had as recently as ten years ago: The understanding of Justices Earl Warren and Hugo Black. This was that our traditions allow for full freedom of speech, but that our traditions also demand that the exercise of our rights be done in a manner that accords with our responsibilities. I don't mean by this, that I think the welfare of the Republic is immediately threatened by platoons of potential flag burners, and I think it's important to realize that I'm not motivated by a Spanish-inquisition-type zeal to punish flag desecrators or even flag defecators.

I am motivated by a desire to recapture the community's right to set standards of responsibility and decency, and to guarantee that there are some things that are even more important than individual self actualization. We have no national religion, nor do we have many coherent tangible symbols of our traditions of liberty under law, of liberty with responsibility. The flag may be the only such symbol we possess, and if we, as a community, do not have the right to preserve

that symbol in a manner that expresses the responsibility and decency that are necessary for civility and popular sovereignty itself, then it is not likely that the goals for which our republic was founded will long endure.

V. A Constitutional Crossroads

We are now at an important Constitutional, political, and social crossroads. The events in Europe in 1989, and the events in the United States in the last six years, as we have seen the formation of new political alignments and new party platforms, and as we have been through a wrenching impeachment proceeding, have demonstrated that much of what passed for wisdom in the American media and even in the American legal academy was simply foolishness or worse.

This is not to say that there have not been very positive developments in recent years. Even the Supreme Court has recently shown signs of recapturing the Constitution, as several of its recent decisions have reasserted the primacy of popular sovereignty in the states, and reminded us that the federal government is one of limited and enumerated powers.

Perhaps the Supreme Court and the American people are on the brink of recapturing much of the original understanding of the constitution itself, and I think the Flag Protection Amendment is a very good means of contributing to that process. Still, some of the Flag Protection Amendment's critics have suggested that to pass this Amendment would amount to "trivializing the Constitution." They reach this conclusion because they assert that the number of potential flag burners are few, that it is more appropriate that they be pitied rather than punished, and that flag

burning itself represents no threat to the stability of the republic. Other critics continue to maintain that to pass the Flag Protection Amendment would be dangerously to amend the First Amendment and the Bill of Rights itself. How might one respond to these criticisms?

To address the trivialization point first. It is not the fate of individual flag burners that is at stake here; the Flag Protection Amendment is more properly viewed as a question of the continued nature of the American political and social community itself. Nothing could be more important than the right of the people to express and implement our tradition of guaranteeing the responsibility that is necessary as a foundation for liberty. Far from being a threat to the First Amendment and the Bill of Rights, the baseline of decency, civility, responsibility and order that the Flag Protection Amendment is designed to supply is what makes the exercise of our fundamental freedoms possible. As the Framers understood and often observed, liberty without order or without responsibility soon becomes anarchy, and anarchy is inevitably followed by repression and tyranny. We have not reached the fatal point of anarchy yet in America, but we have come disturbingly close.

It is time for some responsibility, not to attack, but to protect the First Amendment, and our other freedoms. The Flag Protection Amendment does nothing to infringe the First Amendment. It does not forbid the expression of ideas, nor does it foreclose dissent. It merely allows the people to reassert their right to shape the contours of political development in the country and to reconstruct a dangerously fractured sense of community.

Mr. HYDE. Thank you, Professor.

Mr. STEPHAN ROSS?

STATEMENT OF STEPHAN ROSS, HOLOCAUST SURVIVOR

Mr. ROSS. Mr. Chairman, members of the Judiciary Committee, my name is Steve Ross. In my wildest imagination, would I believe that I would sit in front of the Judiciary Committee debating the desecration of the flag. I was liberated from the Dachau Concentration Camp on April 29, 1945. I had one more day to live before I was injected with typhoid fever serum and malaria. Most of the people who were on quarantine where I was did not come back. I came to America in 1948, from the places of gas chambers, fire ashes and death. When I was 9 years old, the Germans ripped me away from my family in Poland. For five long bitter struggling years, I was a prisoner of the Nazis, in 10 camps where thousands of children, men, women died by their war machine. I lived on bread crumbs, saw dust, human remains. Twenty men to one pound of bread, mixed with sawdust.

I didn't know whether I will be liberated first or whether I will be dead second. My prayers were answered on April 29, 1945, when I was liberated from Dachau by the U.S. Army. We were watched by these soldiers until we had enough strength to travel to Munich. As we walked along to our salvation, a young American tank commander, whose name I don't know, reached down to help me. He saw that I was just a young boy, sick, and he gave me kind words which I couldn't understand. Gave his own food, which I needed very badly. I weighed 35 pounds. He touched my broken body with his hands and with his heart. For the first time in 5 years, I wept. I was hardened, I could not cry, and now there was no one to cry to. I fell at his feet and I kissed his boots. This tank commander kneeled by my side, lifted me up and wiped my tears away with his handkerchief, which I didn't know until a later date that this was a flag. Only later did I know that his handkerchief that he wiped away my tears was a small American flag the first I had ever seen since I left the camp. This flag became my flag of freedom. Freedom is not free, ladies and gentlemen. For 54 years, I

have cherished that little flag which embodied the hope, the freedom and the life that the American soldier gave me. I will always remember those heroes who liberated me. Some of them are sitting behind me. I spoke to them this morning. I show my gratitude every time I salute the flag that was there and today it is mine. Those who came from places such as I came from never forget how precious the flag of freedom is to all of us. So many Americans do not really understand how precious their flag is. When I speak in the schools to young people, I tell them, Hang the flag out. It is a symbol of U.S. freedom. You don't know what we had to endure to have a flag like this, to come to this country. I wish they did. I wish they could feel in their hearts the honor that I feel for it and for all it represents and for those soldiers who freed me. I kiss each one of them, and they say they were a liberator, because I remember when they came, the way they looked, the way they were, with their weapons, rough and tough, young, strong heroes. The 21st Century will remember the 20th Century's heroes who saved the world from the greatest atrocity and the greatest tragedy men have ever known.

Protest if you wish about the flag, about your country. Curse this great country of ours. I kiss the ground that I walk on. I have never stopped for the last 50 years. I came April 10th, 1948 and this year it will be 51 years I have never stopped kissing the ground that I walk on. Please, in the name of all of those who died, do not make it legal to harm what is so sacred to me and to survivors of the death camps and to people all over the world who have cherished that flag and our freedom. When you harm my flag, our flag, you steal from me the freedom to protect what once protected me so dearly, so compassionately. What once wiped my tears of hopelessness and gave me the breath of freedom, the price of desecration is too high. I support the constitutional amendment to protect the glorious flag of freedom. God bless America and God bless our flag of freedom, and preserve it forever.

Gentlemen, I am shaking. The reason I am shaking, is I have been shaking since I came here last night. I speak well, but I am shaking, because I love your country. I love my adopted country. You opened the door for thousands like me. You brought us here and you gave us an opportunity to grow, to prosper and to enter into the American dream. I was a part of the American dream, and still am. I have my own family, I have two children, I have a wife. I have done well in this great Nation, because you took me under your wings. How about it? Preserve that symbol, that great national symbol of freedom. This is ours. Please don't deny those who deserve so much for what they have given, for what they have done. I have given out 400 letters that I wrote up, the way I saw the American soldier coming into the Dachau Concentration Camp. We didn't even know how they were able to get in into that camp, because everything was electrified. I was there for 7 months. I went through, 10 difficult concentration camps for 5 long drawn out years, losing everything, even my identity. The only thing that I had was a number on my arm and a number here on my jacket was my symbol of a political prisoner.

Do what you can to save the flag. Too much freedom is anarchy, the way I see it. This is a picture that you could pass around, if

you desire. A picture of me when the American troops came into the Dachau Camp. This is how I looked. This is the little boy right here, putting one hand up like that, overjuvulent. This is the picture that they used for propaganda purposes for the Red Cross. This is me again for the Red Cross. They wouldn't let Red Cross come in, and it was the American soldier that was the first witness to our plight. And this is the flag that I photographed, show it to children in school. This is the soldier. There is a monument in Jersey City, New Jersey, Liberty Park. This is a poster dedicated to the U.S. Army by inmates like me. They spent a million dollars to give a present to the Army. I have got here a little card from the memorial. I was the founder of the New England Holocaust Memorial. I recently got permission to put in a flag and a plaque to our liberators who saved the world. They saved us and they saved the world from the greatest atrocity man has ever know.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Ross follows:]

PREPARED STATEMENT OF STEPHAN ROSS, HOLOCAUST SURVIVOR

Mr. Chairman, members of the Judiciary Committee, my name is Steve Ross.

I came to America as an orphan on April 10, 1948 and I became a naturalized citizen of the United States of America on May 3, 1953.

I came from the places of gas chambers, fire, ashes and chaos to my adopted country. The American people embraced me and took me under their wing and gave me an opportunity to grow and prosper, so that I could become one of them. I am proud to live free in this generous society.

Fifty years ago, American soldiers saved me from the hell of Dachau. They nursed me back to health and restored my will to live. Yet, what I remember most about my liberation is my tears being spilled on a small American flag. From that day to this, my love for our flag has never faltered.

My story begins in 1940. When I was nine years old, the Germans took me from my home in Krasnik, Poland. For five years I was a prisoner of the Nazis in 10 death camps, where I saw thousands of men, women and children brutally murdered and starved or worked to death by the Nazi's death machine.

I lived on bread crumbs, sawdust, human remains, and one small prayer for redemption or death—whichever was quicker.

My prayers were answered on April 29, 1945, when I was liberated from Dachau by the 42nd and 45th Infantry Divisions of the US 7th Army. We were nursed for several days by these war-weary, but compassionate men and women until we had enough strength to travel to Munich for additional medical attention.

As we walked ever so slowly and unsteadily toward our salvation, a young American tank commander—whose name I have never known—jumped off his tank to help us in whatever way he could.

When he saw that I was just a young boy, despite my gaunt appearance, he stopped to offer me comfort and compassion. He gave me his own food. He touched my withered body with his hands and his heart. His love instilled in me a will to live, and I fell at this feet and shed my first tears in five years.

He kneeled by my side and gently wiped them away with his handkerchief. It was only later, after he had gone, that I realized that his handkerchief was a small American flag, the first I had ever seen. It became my flag of redemption and freedom.

For more than 50 years I have cherished that flag. It represents the hope, freedom and life that the American soldiers returned to me when they found me, nursed me to health, and restored my faith in mankind. That is why today, I am working to help pass an amendment to the Constitution to protect our flag from physical desecration.

The memories of those heroes who liberated me will forever be a part of me. I show my gratitude to them for delivering me from hell every time I salute the flag that was theirs, and today is mine.

Even now, 54 years later, I am overcome with tears and gratitude whenever I see our glorious American flag, because I know what it represents not only to me, but to millions around the world.

Most of us have come here in search of freedom. The flag that we wave today has a very special meaning to me. It reflects the hope and freedom I have enjoyed for the past 50 years.

My great appreciation of the American Flag is coupled with my gratitude, and my admiration of the American soldiers who found me, freed me from the Valley of Death, and restored my faith in God, in mankind, and gave me THIS FLAG of Freedom.

Those who come from dictatorial societies never forget how precious the Flag of Freedom is to them.

Perhaps only those who have had their humanity brutally torn from them as I did can fully appreciate this great country and what its flag represents. Yet every American, out of deference for the sacrifices that purchased and maintain their freedom should revere and honor our flag.

Protest if you wish. Speak loudly, even curse our country and our flag, but please, in the name of all those who died for our freedoms, don't physically harm what is so sacred to me and to countless others.

When you harm our flag, you violate my freedom to protect what once protected me, liberated me, restored my human dignity and wiped away my tears. The price of desecration is too high. I support a constitutional amendment to preserve America's dignity, America's values, and America's flag.

God bless America, and God bless our flag.

Mr. HYDE. Thank you, very much, Mr. Ross.

STATEMENT OF HON. DAVID SKAGGS, FORMER MEMBER OF CONGRESS AND EXECUTIVE DIRECTOR, DEMOCRACY AND CITIZENSHIP PROGRAM, ASPEN INSTITUTE.

Mr. SKAGGS. Thank you, Mr. Chairman. It's a real privilege to be before this committee.

I urge you in the name of freedom to reject the temptation to send this legislation to the House.

This is a debate about patriotism, about love of country. This amendment seeks an official orthodoxy on the expression of patriotism, prohibiting under penalty of criminal law a certain way of expressing love of country. I know that may be a shocking way to put it, but it's the truth.

If you pass this amendment, you presume to read the minds of dissenters in America, a scary proposition. You would be saying, as a matter of law, that the kind of political expression embodied in flag desecration can spring only from evil and criminal intent and, therefore, is the proper subject of the criminal law. You would admit of no possibility that such expression could come from legitimate motive. Or, surely, if it ever did, we would not ban it in the land of the free.

For me, flag desecration is abhorrent. I would never choose that way of expressing myself. I love my country and its flag. I joined the Marine Corps in 1963, rather than worry about the draft. I requested orders to go to Vietnam, because it seemed like the only thing to do, as all the men I trained with were going there. But I believed the war was wrong. I was hugely conflicted between my sense of duty to the Marine Corps and my country on the one hand, and my sense of what was right. I marched against the war before I went on active duty. I saw flags burned in protest over that war.

It is simply beyond the flawed wisdom that any one of us possesses to say that those who protested that miserable dirty war in that way did not love their country; to say that they did not hold their ideals about America so fervently that even flag burning became a cry of desperation about how far their country had strayed from what they thought the flag stood for; or, at least to say that

with enough certainty to amend the Constitution of the United States.

That's 30 years ago. Let's pray we are never again in a conflict that tears the country apart as Vietnam did. But we sit here this afternoon on the brink of war against Yugoslavia. In my view, we meet on the verge of yet another failure by this great body to meet its constitutional responsibilities under the War Powers Clause. Now that's something worth getting upset about. Congress' constitutional energies would be much better spent carrying out its own sacred duty to the American people to assert its power to decide about going to war, than fretting about the means of expression of those who disagree when we do.

I didn't have very tough duty in Vietnam. I was no hero, thank God. I never had to kill anybody. I did spend some time out in the beautiful, yet terrifying countryside west of DaNang. I did get shot at a couple times, and I do remember the relief of getting back to base and seeing our flag flying proudly, a beacon of safety, an inspiration.

What an inspiration this great Nation is! I was privileged to travel abroad as a Member of Congress. Everywhere I went, I was reminded over and over again of the power of our ideas and our ideals, especially in the nations of the former Soviet block. There, I heard so many times words of thanks to America for having kept hope alive during the decades of repression and of totalitarian attempts at thought control. Such were the words spoken to me by an 80 year old voter bicycling to the polls in a little village outside Berlin during the Spring of 1990, where I was an observer at the first free elections since before Hitler came to power. Similar words were spoken in Russia and Hungary, and Latvia and Romania.

So now as we share the exhilaration of millions around the world who are realizing the freedoms we have enjoyed so long, now we would curtail our freedoms in the name of protecting the symbol of those freedoms? We, in America, of all places, should suppress dissent? This is legislation that we might have expected from the Supreme Soviet or from Castro's puppet assembly, but not from the Congress of the United States of America.

This is a debate about patriotism. Can anything be more patriotic in this nation than upholding the right of free expression of dissent. Have we forgotten the protest of our founding fathers fighting against the Stamp Act?

Nothing is more central to the ability of this democracy to work than the free flow of information, argument and, yes, dissent. Even dissent expressed in ways that may be offensive to me, and you, and most Americans. That's why the first amendment is so unyielding in its terms, which, of course, is the reason we are here this afternoon, struggling to find a way to do what the courts have explained the first amendment does not allow to be done.

So you want to amend the first amendment. How profoundly sad to sully that bulwark of our freedom, and to invite with this revision another revision, and another after that.

Don't do it, Mr. Chairman. We are stronger than that. We are not threatened by the puny protest of a flag desecration every month or two.

We are threatened when the first amendment becomes fair game. We are threatened when we take the first insidious step down the path toward an orthodoxy of dissent and a patriotism of compulsion, contradictions, if there ever were ones.

Mr. Justice Holmes gave us these good words to live by this afternoon, words to heed before this afternoon becomes twilight for a portion of our liberty; "We should be eternally vigilant against attempts to check the expression of opinions we loath."

Thank you, Mr. Chairman.

[The prepared statement of Mr. Skaggs follows:]

PREPARED STATEMENT OF HON. DAVID SKAGGS, FORMER MEMBER OF CONGRESS AND EXECUTIVE DIRECTOR, DEMOCRACY AND CITIZENSHIP PROGRAM, ASPEN INSTITUTE

Thank you, Mr. Chairman, for this opportunity to express my views on this proposed legislation. As you may recall, this is a matter about which I had strong views while a Member of the House. I still do, as a civilian. I urge you—in the name of freedom—to resist the temptation to send this bill to the House.

In a very real way, this is a debate about patriotism, about love of country. The amendment before you would impose an official orthodoxy on the expression of patriotism, prohibiting under penalty of criminal law a certain way of expressing love of country.

I suppose that may be a shocking way to put it. But, it's the truth. By passing this amendment, you presume to read the mind of dissenters in America—a scary proposition. You would say as a matter of law that the form of political expression embodied in flag desecration can only spring from evil and criminal intent, and therefore is the proper subject of the criminal law. You would admit of no possibility that such expression could come from legitimate motive, for surely, if it ever did, we would not ban it in the land of the free.

Now, for me, flag desecration is abhorrent. I would never choose that way of expressing myself. I love my country and its flag. I joined the Marine Corps in 1963 rather than worry about the draft. I asked for orders to Viet Nam—twice—because it seemed like the only thing to do, when all the men I trained with were going.

But I believed the war there was wrong. I was hugely conflicted between my sense of duty to the Marine Corps and my country, on the one hand, and my sense of what was right.

I marched against the war before I went on active duty. I saw flags burned in protest over that war. Far be it from the flawed wisdom that any one of us possesses to say with enough certainty to amend the Constitution of the United States that those who protested that miserable, dirty war in that way did not love their country; that they did not hold *their* ideals about America so fervently that flag burning became a cry of desperation about how far their country had strayed from what they thought the flag stood for.

That was 30 years ago. Let's pray we are never again in a conflict that tears the country apart the way Viet Nam did. But we sit here this afternoon on the brink of war against Yugoslavia, and, in my view, on the verge of yet another default by this great body in fulfilling its constitutional responsibility under the war powers clause.

Now that's something worth getting upset about! Congress's constitutional energies would be much better spent carrying out its own sacred duty to the American people to assert its power to decide about going to war, than to fret about the means of expression of those who disagree when we do.

I didn't have very tough duty in Viet Nam. I was no hero. I didn't have to kill any one. I did spend some time out in the beautiful and terrifying countryside West of DaNang. I did get shot at a couple of times. And I do remember the relief of getting back to base and seeing our flag flying proudly, a beacon of safety and an inspiration.

An inspiration. What an inspiration this great nation is! I was privileged to travel abroad as a Member of Congress, and everywhere I went, I was reminded over and over again of the power of our ideas and ideals. That was especially true in the nations of the former Soviet bloc. There, I heard so many times words of thanks to America for having kept hope alive during decades of repression and totalitarian efforts at thought control. Those words were spoken by an 80-year-old voter bicycling to the polls in a little village in East Germany, during the spring of 1990, where I was an observer in their first free elections since before Hitler. They were spoken in Russia and in Hungary and in Estonia and in Armenia.

So, now, as we share the joy of hundreds of millions around the world realizing for the first time the freedoms we have enjoyed so long, now, we would curtail our own freedoms, in the name of protecting the symbol of those freedoms. We in America, of all places, would suppress dissent! This is legislation that we might have expected from the Supreme Soviet, or from Castro's puppet Assembly, but not from the Congress of the United States of America.

This is a debate about patriotism. Can anything be more patriotic in this country than upholding the right of free expression of dissent? Have we forgotten the protests of our founders, fighting the Stamp Act?

Nothing is more central to the ability of this democracy to work than the free flow of information, argument, and, yes, dissent. Even dissent expressed in ways that may be offensive to me and you and most Americans. That's why the First Amendment is so unyielding in its terms. Which, of course, is the reason that we're here this afternoon, struggling to find a way to do what the courts have explained the First Amendment does not allow to be done.

So, you want to amend the First Amendment. How profoundly sad to sully that bulwark of our freedom—to invite, with this revision, another and another.

Don't do it. We are stronger than that.

We are not threatened by the puny protest of one flag desecration every year or two. But we are threatened when the First Amendment becomes fair game for politics, when we take the first, insidious step down the path toward an orthodoxy of dissent, and a patriotism of compulsion—contradictions if there ever were ones.

Mr. Justice Holmes gave us these good words to live by this afternoon, before this afternoon becomes twilight for a portion of our liberty:

"We should be eternally vigilant against attempts to check the expression of opinions we loathe."

Thank you, Mr. Chairman.

Mr. HYDE. Thank you, Mr. Skaggs.
Bishop Pearson?

STATEMENT OF BISHOP CARLTON D. PEARSON, SENIOR PASTOR, HIGHER DIMENSIONS FAMILY CHURCH

Mr. PEARSON. Thank you, Mr. Chairman. Members of the subcommittee, I am here on behalf of the thousands of members of my own local congregation in Tulsa, Oklahoma, as well as hundreds of additional churches and ministries under my oversight as Bishop. I represent them in saying, today, that all of us love America. We are not all Christian, we are not all Jew, we are not all black or white, but we are all Americans.

When I arrived here at midnight last night, I couldn't help but notice the beautifully brightly lit newly renovated Washington Monument. Thinking about appearing before the subcommittee today, I wondered what would have happened if I had have instructed our driver to pull over and allow my associate and I to go over and begin to vandalize the monument, spraying it with graffiti, setting fires to its base, or even chipping away at the brick and mortar out of which it is constructed. Had I done so, I don't think I would be sitting before you today. I would be in jail awaiting arraignment and ultimate prosecution for vandalizing a national treasure and defacing public property protected by our government.

I am here today, because I consider the United States flag also a national monument and a treasure and a public property. The Congressman from Massachusetts, Mr. Frank, said a moment ago, as long as it doesn't intrude on the person or property of other people. He said, property or persons of others. When it comes to property or persons of others, we have the right to be strict. I consider the United States flag our corporate common property. It belongs to the United States, and the Government should be in a position to protect it from vandals and scandals that demean, denigrate or

insult the standards it probably represents today. The President of the United States in addressing the issue concerning Kosovo. He said that many people are killed worldwide, motivated by a primitive consciousness that says what is different about us is more important than what we have in common. The flag is maybe the single symbol that we have in this Country in common. In the late 1960's and early 1970's, I walked around proudly in San Diego, California with my draft card on my person at all times, my draft number memorized, not necessarily eager, but at least willing to fight in the Vietnam War. I was 18 years old, ordained minister, and had a legal right to file conscientious objection to avoid the draft, but refused to against the advice of my church and my pastor, and also my ordaining Bishop. Do you know why? I didn't want to appear the cowardly preacher hiding behind my religious security blanket, while my friends were coming back from the War in plastic bags and flag draped wooden boxes, having given their lives to protect the very freedom I had to file conscientious objection without fear of religious persecution as a result of that choice.

The flag is the symbol of our country, and a country is its people. The flag represents its people. So when we destroy the flag, in effect, we are attempting to destroy ourselves. I believe that the greatest terrorist threat to the United States is not from across the ocean, but from some misguided radical thinkers, right here within our own borders, on our own soil, who enjoy the very freedoms they seek to destroy by destroying the symbol of those freedoms. We believe in the emblems, the banner, the standard of our country. We believe we speak for the majority of Americans when we say we want our flag protected.

From the top to the bottom, the White House, the courthouse, the schoolhouse, the church house, all the way down, it seems, to the dog house, we are experiencing a dreadful decline in standards, morals and ethics. As Donnie Burley asked in his book, *Restoring the Good Society*, how can a society that has produced more freedom and prosperity than any other in history and has been so generous in its distribution also increasingly lead the world in so many categories of social pathology? The physical desecration of the flag, the ban of the—is a sign of the morals and psychological weakness in our society. When we have lowered ourselves to blindly accept that which we know is wrong, we devalue both the symbol and everything for which it stands. We need to reawaken a moral conscience in our Nation. This issue not about just protecting a piece of cloth, as some would think. The debate is about the values we believe are necessary for our Nation to survive and the values and standards that so-called piece of cloth represents.

Last summer I had the honor of presiding over a rally for the flag protection amendment in my hometown, Tulsa, Oklahoma, which later aired repeatedly all over the country on nationwide television. Over a thousand people had very short notice, attended that event to hear testimonial songs and support of flag protection from some of our Nation's greatest heroes. The attendees that night represented every race, color, culture, creed, and social economic status, and they cheered and celebrated Old Glory and the return of her faithful protections. And the evening was divinely inspired.

As a young boy, and later a young man, growing up in the turbulent 1960's, in the middle of the Civil Rights movement, the radical revolution of American disgruntled young people and the Vietnam War, while watching the sometimes violent protestations on television with the rest of America, I would always feel a more pronounced and almost strange sense of anger and resentment toward those I saw burning, or in anyway desecrating the flag. At that time, I was not sure why I felt so uncomfortable, and even threatened by such acts. At first, I thought it was because of what I had been taught in grade school in Southern California, while I was on the flag patrol, and where such actions, including accidentally touching the flag to the ground, were absolutely forbidden and would result in the immediate expulsion from the honored prestigious patrol. Now, as I look back, I realize that what bothered me most is the fact that the flag for most Americans, especially African Americans, has never represented a reality already actualized, instead it represents the symbol, the banner and standard of our hopes and dreams toward a reality. It represents the possibilities and ultimately probabilities of peace, prosperity and corporate equity, fairness for all of this God ordained republic. The flag represents our common and corporate hopes, the very dream Dr. Martin Luther King shared with our Nation, which many of us are living.

In closing, let me say that we are a Nation of symbols. The cross is the symbol of Christianity, the ring, the symbol of covenant marriage, the flag, a symbol of the United States of America and all it hopes to be. To legalize desecration of the symbol of our Nation destroys the bond that is intended to unite us all. We voted you in as lawmakers to police and make policies to protect us and our standards from lawbreakers. I trust you will do the right thing.

Thank you for inviting me to testify before the subcommittee today. God bless you. God bless America.

[The prepared statement of Bishop Pearson follows:]

PREPARED STATEMENT OF BISHOP CARLTON D. PEARSON, SENIOR PASTOR, HIGHER DIMENSIONS FAMILY CHURCH

Mr. Chairman and Members of the Subcommittee, it is an honor to appear before you today to communicate a matter of critical importance to the American people. I am here on behalf of the thousands of members of my local congregation, in Tulsa, Oklahoma, as well as the hundreds of additional churches and ministries under my oversight as Bishop. I represent them in saying today that "We, all of us, love America."

The flag is the symbol of our country and a country is its people. The flag represents its people. So when we destroy the flag, we are destroying ourselves. I believe that the greatest terrorist threat to the United States is not from across the ocean, but from some misguided, radical thinkers here within our own borders, on our own soil, who enjoy the very freedoms they seek to destroy by destroying the symbol of those freedoms. We believe in the emblems, the banner, the standard of our country, and we believe we speak for the majority of Americans when we say, "We want our flag protected."

Everyday our news is bombarded with many activists—from the environment to animal rights . . . to women's rights . . . to civil rights . . . and so many others. Today I am here as an activist for America.

From the top to the bottom, from the White House to the Courthouse . . . to the School House . . . to the Church House . . . all the way down, it seems, to the dog house . . . we are experiencing a dreadful decline in standards, morals and ethics. As Don E. Burly asks in his book *Restoring the Good Society*, How can a society that has produced more freedom and prosperity than any other in history, and has

been so generous in its distribution, also increasingly lead the world in so many categories of social pathology?

The physical desecration of the flag, banner and standard of our nation is a sign of the moral and psychological weakness in our culture. When we have lowered ourselves to blindly accept that which we know is wrong, we devalue both the symbol and everything for which it stands. We need to reawaken the moral conscience of our nation.

This issue is not just about a piece of cloth. The debate is about the values that we believe are necessary for our nation to survive and the values and standards that so-called piece of cloth represent. We are not better served by a society where anything goes, but by a society where honesty, respect for mankind and pride in country are not just catchy phrases, but words to live by.

Why should we respect and continue to allow the undignified, irresponsible, irreverent, despicable actions of a minority group of thinkers who, in trouncing the flag under their feet and destroying it in every horrendous and appallingly unimaginable way, would just as soon trounce and destroy everything that's good, that's wholesome, that's decent and that's right about what the flag represents. We believe it is time to raise the standard, establish some boundaries, draw some lines and make it illegal to cross those lines—with penalty of prosecution.

Last summer I had the honor of presiding over a rally for the flag protection amendment in my hometown of Tulsa, Oklahoma, which later aired repeatedly all over this country on nationwide television. Over a thousand people at very short notice attended that event to hear testimonials, song and prayer in support of flag protection from some of our nation's greatest heroes, entertainers and clergy. The attendees that night represented every race, color, culture, creed and socio-economic status, and they cheered and celebrated Old Glory and the return of her rightful protections.

In a word, the evening was divinely inspired. It also reinforced what I already knew, that returning legal protection for the flag is not the battle cry of one political party versus another, of conservative versus liberal, or black versus white. On the contrary, it is an issue that inspires unity, diversity, majority and hopefully, at long last, victory for our entire nation.

This is government of the people, by the people, for the people. We are merely asking for the government to return to the American people the right to protect their flag.

It seems that Congress is paying attention to public opinion polls as never before. Well, the national polls say that between 75% and 80% of Americans want their flag protected. I think it's time to do what the people who sent you here by ballot and support have requested.

As a young boy and later a young man growing up in the turbulent 60's, in the midst of the Civil Rights movement, the radical revolution of American disgruntled young people and the Vietnam War, I would always feel a more pronounced sense of anger and resentment toward those I saw burning or in any way desecrating the American flag. At that time, I was not sure why I felt so uncomfortable and even threatened by such acts.

At first, I thought of lessons I learned as a fourth and fifth grader in the John J. Montgomery elementary school in Southern California, where I was on what we called "The Flag Patrol," where such actions, including even accidentally touching the flag to the ground, were absolutely forbidden and would result in an immediate expulsion from the honored and then prestigious position as a member of the "Flag Patrol."

Now, as I look back, I realize that what bothered me most is the fact that the Flag for most Americans—especially African Americans—has never represented a reality already actualized, it instead represents the symbol, banner and standard of our hopes and dreams toward a reality. It represents the possibilities and ultimately probabilities of peace, prosperity and corporate equality and fairness for all of this God-ordained Republic.

When those misguided and unrestrained Zealots displayed such blatant disrespect for our flag, I felt threatened and insulted, even personally attacked, affronted, accosted and assailed by those who were seeking to destroy the banner that represented our nations and yea even my own promise and hopes of a better future for all peoples.

The flag represents our common and corporate hopes of the very dream Dr. Martin Luther King shared with our nation and the world.

Many of us are actually living that dream while others are set on destroying it. We must not permit their success at such a dishonorable course or cause.

In closing, let me say that we are a nation of symbols. The cross is a symbol of Christianity; a ring is a symbol of covenant in marriage, and the flag is a symbol

of the United States of America and all it is and hopes to be. The legalized desecration of the symbol of our nation destroys the bond that is intended to unite us all. We voted you in as lawmakers to police or make policies to protect us and our standards from lawbreakers. I trust you will do the right thing.

Thank you for inviting me to testify before the Subcommittee today. God bless you and God bless America.

Mr. HYDE. Thank you very much, Bishop Pearson.

Mr. CLIFTON?

**STATEMENT OF DOUGLAS C. CLIFTON, EXECUTIVE EDITOR,
THE MIAMI HERALD.**

Mr. CLIFTON. Thank you, Mr. Chairman.

Mr. HYDE. Will you throw the switch.

Mr. CLIFTON. I will do my best.

Mr. HYDE. Thank you.

Mr. CLIFTON. In the long debate over this issue of flag desecration, the House and Senate have heard from a long line of witnesses, many of them combat veterans and many of those heroes. Though in reference to veterans on both sides of the issue who appeared in earlier hearings, let me state clearly that I am no hero. I served as an artillery officer in Vietnam during the Tet offensive. My unit helped liberate Hue, shot in support of the 101st Airborne Division in some of its toughest fights and prowled I-Corps from Quang Tri City to the DMZ. But like thousands of young men just like me, I struggled with my fears, overcame them, did my duty, and 12 months later went home, thankful to be in one piece. Most of those with whom I served are what I call quiet patriots. We were not gleeful about leaving our families, in my case, a 3-month old daughter and a wife of 2 years, nor were we eager to put ourselves in harm's way. But neither would we think of cutting and running, or faking conscientious objection, or illegitimately dodging what we believed was the obligation of citizenship. Some of us intellectually grasped the important duty, honor, country, but the rest of us just felt it. And to most of us, free speech was little more than the right to gripe, gripe about the C-rations, the mail service, the C.O., the war itself. Back home, others were griping too, about us and the war we were fighting. They cursed us, called us baby killers and even on occasion burned the flag we were so dutifully defending. I would be exaggerating if I told you I went to Vietnam in 1967 to defend those protesters' right to burn the flag. But I know this, if I were called back into service today, it would be precisely for that reason. That is because the last 30 years have given me an understanding of the first amendment that is exceeded only by my reverence for it. I live in a community that offers daily reminders of how precious free speech is and demonstrates the extremes to which one will go to live in a land that cherishes it.

Almost every day, the *Miami Herald* reports the arrival of another boatload of Cuban or Haitian refugees, another tragedy at sea, another titanic struggle to flee oppression and find comfort in a country that allows you to criticize your government and boast about it.

We, in Miami, have a greater interest in what goes on in Latin America and the Caribbean than the rest of the country. So you may not be familiar with the story that has been getting heavy coverage in my paper; the incamera trial, conviction and sentencing of

four Cuban intellectuals. Their crime; having the temerity to publish a pamphlet entitled "The Homeland Belongs To All." In Cuba, expressing such a view is an offense punishable by imprisonment, in this case, from 3½ to 5 years.

But what does that egregious curtailment to political speech have to do with a ban on flag burning? The answer is rich and deep and has been laid out repeatedly in the hundreds of editorials and columns written by members of the American Society of Newspaper Editors, the organization I represent today.

Flag burning, lothesome as I believe that it is, is nothing more than political speech expressed in different form and, as such, enjoys the same first amendment protections. Would we amend the Constitution to prohibit verbal denunciations of America? I cannot believe that we would even consider it. Then how can we amend it to prohibit symbolic ones? The Supreme Court saw no distinction between the two when it struck down the Texas flag burning law. "If there is a bedrock principle underlying the First Amendment, the court wrote, it is that government may not prohibit the expression of an idea simply because society finds the idea, itself, offensive or disagreeable." What is desecration of the flag, if not the expression of a disagreeable idea? And what is more disagreeable in this robust and wonderful democracy of ours than prohibiting expression of any idea? Of the many freedoms Americans enjoy, those enumerated in the first amendment most clearly define our national character. We are free. Free to worship as we wish, free to speak as we wish, free to write as we wish, free to think as we wish. Our freedom fuels our spirits, stokes our ambition, energizes us as a country. The 45 words of the amendment have stood unchanged for 210 years, and now we propose to amend them, amend a set of principles that are the envy of the world. Why? To stop people from burning the flag? Have I been missing something. The last flag I saw burned, as an act of protest was during that war I fought almost 30 years ago. Yes, it offended me, but in a peculiar way it made me feel better about what I had been called to do, and had the flag burners under constitutional mandate been jailed for their defiance, I would have felt far worse.

I spoke earlier about how dissent is treated in Cuba. It might interest you to know that burning the Cuban flag is treated the same way. You go to jail for it. Why would we want to model our first amendment behavior on theirs.

Thank you.

[The prepared statement of Mr. Clifton follows:]

PREPARED STATEMENT OF DOUGLAS C. CLIFTON, EXECUTIVE EDITOR, THE MIAMI HERALD

In the long debate over this issue of flag desecration the House and Senate have heard from a long line of witnesses, many of them combat veterans and many of those heroes.

So in deference to those veterans on both sides of the issue who appeared at earlier hearings, let me state clearly that I am no hero. I served as an artillery officer in Vietnam during the Tet offensive. My unit helped liberate Hue, shot in support of the 101st Airborne Division in some of its toughest fights and prowled I-Corps from Quang Tri City to the DMZ. But like thousands of young men just like me, I struggled with my fears, overcame them, did my duty and, 12 months later went home, thankful to be in one piece.

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wife of two-years—nor were we eager to put ourselves in harm's way. But neither would we think of cutting and running or faking conscientious objection or illegitimately dodging what we believed was the obligation of citizenship.

Some of us intellectually grasped the import of "duty, honor, country" but the rest of us just felt it. And to most of us free speech was little more than the right to gripe, gripe about the C-rations, the mail service, the CO, the war itself.

Back home others were griping too, about us and the war we were fighting. They cursed us, called us baby killers and even, on occasion burned the flag we were so dutifully defending.

I would be exaggerating if I told you I went to Vietnam in 1967 to defend those protestors' right to burn the flag. But I know this, if I were called back into service today it would be precisely for that reason. That's because over the past 30 years I've developed an understanding of the First Amendment that is exceeded only by my reverence for it.

I live in a community that offers daily reminders of how precious free speech is and demonstrates the extremes to which one will go to live in a land that cherishes it. Almost every day The Miami Herald reports the arrival of another boatload of Cuban or Haitian refugees, another tragedy at sea, another titanic struggle to flee oppression and find comfort in a country that allows you to criticize your government and boast about it.

We in Miami have a greater interest in what goes on in Latin America and the Caribbean than the rest of the country, so you may not be familiar with a story that has been getting heavy coverage in my paper: The in-camera trial, conviction and sentencing of four Cuban intellectuals. Their crime? Having the temerity to publish a pamphlet titled "The Homeland belongs to all." In Cuba expressing such a view is an offense punishable by imprisonment, in this case from 3 1/2 to 5 years.

But what does that egregious curtailment of political speech have to do with a ban on flag burning?

The answer is rich and deep and, has been laid out repeatedly in the hundreds of editorials and columns written by members of the American Society of Newspaper Editors, the organization I represent today.

Flag burning, loathsome as I believe it is, is nothing more than political speech expressed in different form and, as such, enjoys the same First Amendment protections. Would we amend the constitution to prohibit verbal denunciations of America? I can't believe we would even consider it. Then how can we amend it to prohibit symbolic ones?

The Supreme Court saw no distinction between the two when it struck down the Texas flag burning law.

"If there is a bedrock principle underlying the First Amendment," the court wrote, "it is that government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."

What is desecration of the flag if not the expression of a disagreeable idea?

And what is more disagreeable in this robust and wonderful democracy of ours than prohibiting expression of any idea? Of the many freedoms Americans enjoy, those enumerated in the First Amendment most clearly define our national character. We are free, free to worship as we wish, free to speak as we wish, free to write as we wish, free to think as we wish. Our freedom fuels our spirit, stokes our ambition, energizes us.

The 45 words of the amendment have stood unchanged for 210 years. And now we propose to amend them, amend a set of principles that are the envy of the world. Why? To stop people from burning the flag? Have I been missing something? The last flag I saw burned as an act of protest was during that war I fought in more than 30 years ago.

Yes, it offended me but in a peculiar way it made me feel better about what I had been called to do. And had the flag burners—under constitutional mandate—been jailed for their defiance I would have felt worse.

I spoke earlier about how dissent is treated in Cuba. It might interest you to know that burning the Cuban flag is treated the same way. You go to jail for it. Why would we want to model our First Amendment behavior on theirs?

Mr. HYDE. Thank you, Mr. Clifton.

And now, Ms. Smith.

STATEMENT OF SHAWNTEL SMITH, FORMER MISS AMERICA

Ms. SMITH. Mr. Chairman, Members of the House Judiciary Committee, my name is Shawntel Smith and I probably call Muldrow, Oklahoma my home. It is an honor to speak to each of

you today in support of H.J. Res. 33, which I believe will restore the place of honor which the United States flag deserves.

I, like many others, have had family members serve in the military. They served courageously and very proudly. Just to name a few, my Grandfather Powell served in the Civil War. My Grandpa Fouts, Roy Gideon Fouts, served as Seaman First Class in World War II. My Grandpa Smith, Harold Elmo Smith, served as a Supply Sergeant in World War II, and was one of the first waves onto the beaches of Normandy. My father, Gailen Maurice Smith, served as a Sergeant in the National Guard, as well. I have great pride that my family has contributed in preserving the freedoms that this very nation stands for, and for that symbol of freedom, the United States flag.

It was brought to my attention not so long ago that most Americans would be shocked to learn that today it is okay, not illegal, but legal to desecrate the symbol of our Nation, the symbol of hope for the world's people, the American flag. In fact, those that were informed about the current law or the lack of protecting law, 80 percent favored an amendment to the Constitution that would provide legal protection of Old Glory, not far from Capital Hill and the Museum of American History is a project to restore the Star Spangled Banner. The 15 star, 15 stripe symbol of determination for free people. It is one flag around which our Nation begins to rally in order to preserve and to protect as we move into the new millennium. Part of the Government to preserve national treasures, more than \$5 million will go toward its preservation.

There are two interesting points, among many about this particular flag. Number one, it is the largest historic textile in the world, and number two, it is one of the most invaluable, historic, significant pieces that we have. In short, it is a piece of cloth that reminds us of our heritage, as is and as does every American flag. We might ask, is the star bangle banner of 1814 the flag of the United States? Yes and no. There were other similar flags before and many others came later, each of which were and still are the flag of the United States. Some might argue that burning the American flag is different from burning the flag of 1814. Our flag, however, is unique in that it exists only in copies and, therefore, every flag is the flag. If we recognize the need to preserve and protect the star spangled banner, then we should recognize the value and the need and the preservation and protection of all star spangled banners. The star spangled banner in the museum is physically less than one we might imagine. Over the years, well many Americans have clipped portions off as souvenirs or awards, with no regard to the importance of keeping the flag whole. Had this practice gone unchecked, the star spangled banner would be but a memory. Those who oppose legal protection well meaning as they may be, relegate the flag of the United States to the same fate. Without a measure of legal protection, the flag is devalued, figuratively speaking, clipped and destined to disappear. The flag of the United States flies today as it did over Fort McHenry. Today, just as it did then, it embodies what we think of as America. And it causes us to pause and to remember those through and why God is here.

The memory of Americans who gave their lives is woven in every stitch of the flag, no matter what its size or its age. And no matter if it flew over Fort McHenry or over the capital of the United States, or from the hand of a young child, the integrity of the flag of the United States deserves protection and preservation. As we go toward the new millennium, we are looking back on our heritage with deep concern for preserving those things uniquely American. The 106th Congress has the opportunity to be part of the preservation in providing protection for our United States Flag. While the archives at the Museum mark the millennium by saving crumbled pieces of our heritage that are in danger of being lost, a flag protection amendment could do the same. It can limit this destructive action of those who would literally rip the flag apart, causing it to crumble and committing it to history, ultimately lost as a living symbol of our Nation.

Because I was blessed with the position of Miss America, I would like to share with you one of the experiences that I had when I was Miss America. Right after my year of service, I was able to go on a Thank You America Tour with my Governor from the State of Oklahoma, Governor Frank Keating. And on this Thank You America Tour, we traveled to many places, but I want to share with you one stop that we made in particular, and that was here at our Capital in Washington, DC. The event was held in a War Memorial room. I remember walking into that room and seeing all kinds of flags, just lined up against the walls. These were flags from other countries. And then in the middle of the room, Mr. Chairman, I remember seeing the American flag. Because the reason, I guess, we were there, saying thank you to all of those that helped in a time of need in Oklahoma City, I became very overwhelmed with what I saw. I was never so proud to be an American. It reminded me of all those men and women that fought in some that literally lost their lives to protect our freedoms. But at that same moment, I also remembered that in a time of crises, we Americans, we pull together and we unite as one.

I want to thank you for allowing me to make comments today. I hope that I left with you that our American flag has many meanings to many people. It can mean strength, it can mean opportunity, it can mean the American dream, it can mean the freedoms that we all appreciate and enjoy every single day. I want to encourage every single one of you to just think about how I think about this issue. To me, desecrating the flag is desecrating all of the things in which the flag stands for.

I thank you so much, and God bless you all.

[The prepared statement of Ms. Smith follows:]

PREPARED STATEMENT OF SHAWNTEL SMITH, FORMER MISS AMERICA

Mr. Chairman, members of the House Judiciary Subcommittee, my name is Shawntel Smith and I proudly call Muldrow, Oklahoma my home. It is an honor to speak to each of you today in support of House Joint Resolution 33, a proposed constitutional amendment that would restore the Flag of the United States of America to its proper place of honor.

I, like many others, have had family members serve in the military. They served very courageously and proudly. Just to name a few, my Great-grandfather Powell served in the Civil War. My Grandfather Fouts—Roy Gideon Fouts—served as Seaman First Class in World War II. My Grandpa Smith—Harold Elmo Smith—served as a supply Sergeant in World War II and was on one of the first waves onto the

beaches of Normandy. And my father Gailen Maurice Smith served as a Sergeant in the National Guard. I have great pride that my family has contributed to preserving the freedoms that our great nation stands for, and the symbol of that freedom the United States Flag.

I count myself fortunate as one of but a few American women to have conferred upon them the title of "Miss America." As the 75th Miss America, I traveled some 20,000 miles a month sharing the message of STW Reinventing America's Work Force. I visited 48 states and encouraged young people to develop skills, set goals, dream dreams and to become all they wish to become. I continue to share this message as Ambassador for the U.S. Departments of Education and Labor. I also share with young people that life is not about fairy tales but that it is about never giving up, never giving in and overcoming obstacles that may arise. I believe in the American Dream—which is the freedom to achieve greatness through hard work, perseverance and determination.

I believe, as I stated earlier, that our flag is the symbol of the American Dream. I can remember standing in elementary school and saying the pledge of allegiance. And, today, I love watching the little boy or girl reciting the pledge of allegiance at the top of their lungs. Young people that say the Pledge of Allegiance with such boldness—view the flag as a cornerstone—one of strength, safety and opportunity. I am constantly amazed at the reverence it receives from our youngest Americans. Children exhibit special concern . . . to treat it reverently, to stand tall and proud as they recite the Pledge of Allegiance.

It was brought to my attention not too long ago, indeed, most Americans would be shocked to learn that today it is okay, not illegal, to desecrate the symbol of our nation, the symbol of hope for the world's people—the American Flag. In fact those who were informed about the current law, or lack of a protecting law, 80% favored an amendment to the constitution that would provide legal protection of Old Glory.

Not far from Capitol Hill, in the Museum of American History, a project is underway to restore the Star Spangled Banner, the 15-star, 15-stripe flag that is the symbol of determination for a free people. It is one flag around which our nation now begins to rally in order to preserve and protect us as we move into the new millennium. Part of a government program to preserve national treasures, more than \$5 million will be dedicated to its preservation.

There are two interesting points, among many, about this particular flag: it is the largest historic textile in the world, and is one of invaluable historic significance. In short, it is a piece of cloth that reminds us of our heritage—as is, as does, every American Flag.

We might ask: is the Star Spangled Banner of 1814 THE flag of the United States? Yes and No. There were other similar flags before, and many others that came later, each of which were and still THE flag of the United States.

Some might argue that burning "A" flag is different from burning "THE" flag of 1814. Our flag, however, is unique in that it exists only in copies and, therefore, every flag is THE flag. If we recognize the need to preserve and protect the Star Spangled Banner, then we should recognize the value and need in the preservation and protection of all Star Spangled Banners.

The Star-Spangled Banner in the museum is, physically, less than the one we might envision. Over the years, well meaning Americans have clipped portions off as souvenirs, or awards, with no regard to the importance of keeping the flag whole. Had his practice gone unchecked, the Star Spangled Banner would be but a memory.

Those who oppose legal protection, well meaning as they may be, relegate the Flag of the United States to the same fate. Without a measure of legal protection the flag is devalued, figuratively "clipped" and destined to disappear.

The flag of the United States flies today as it did over Fort McHenry. And today, just as it did then, it embodies what we think of as America and it causes us to pause and it causes us to pause and remember what and who got us here.

The memory of Americans who gave their lives is woven in every stitch of the flag, no matter its size or age. And, whether it flew over Ft. McHenry, over the US Capitol, or from the hand of a young child, the integrity of the Flag of the United States deserves protection and preservation.

As we go to the millennium, we are looking back on our heritage with a deep concern for preserving those things uniquely American. The 106th Congress has the opportunity to be part of this preservation effort by providing our flag a measure of protection from desecration.

While the archives at the Museum mark the millennium by saving crumbling pieces of our heritage that are in danger of being lost, a flag protection amendment could do the same. It can limit the destructive actions of those who would literally

rip the flag apart, causing it to crumble and committing it to history, ultimately lost as a "living" symbol of our great nation.

Burning a flag is not a matter of free speech, but I believe it is a matter of behavior. It is an insult to the intelligence of the vast majority of common-sense Americans to call flag burning "speech." This is a values issue for the American people. America is a tapestry of diverse peoples. The uniqueness of our nation is our diversity. The flag represents the values, traditions and aspirations that bind us together as a nation. It stands above our differences and unites us in war and peace.

Because I was blessed with the position of Miss America, I had many unforgettable experiences. One in particular I would like to share with you today. Just after beginning my year of service I was asked by the Governor of Oklahoma, Governor Frank Keating, to participate in the thank you America tour—which gave thanks to all of those who so generously and bravely helped during the 1995 Oklahoma City bombing. Being from Oklahoma I took great pride and felt such honor to participate in the ceremony at our nations capital, Washington, DC. I remember walking into the war memorial room in which the ceremony was held; I was overwhelmed with emotion not only for the reason we were there but also because of what I saw. As I looked across the room, I saw flags from all the different countries and in the center of the room, there was a large United States flag. At that moment, I thought of all the men and women who fought for our country, many even sacrificed their lives. I was also reminded of how in a time of crisis we as Americans pull together to help one another.

I thank you for the opportunity to be here today and to share my concern for protecting the Flag of the United States. I hope to have conveyed to you a few of the many meanings the United States Flag embodies. Meanings of freedom, the American Dream, strength, security, opportunity, heritage and unity. To desecrate the flag would be to desecrate all that the flag stands for.

Mr. HYDE. Thank you, Ms. Smith. Unfortunately, Captain Rogers and Brady, we have a vote on. In fact, we have one vote which will take 15 minutes. They are into it now, and then there will three succeeding votes of 5 minutes each. So at the end of those, we will return. I am sorry, but that's what we have to do. So if you don't mind terribly hanging around, while we be back. Thank you.

[Recess]

Mr. CANADY [presiding]. The subcommittee will be in order. I apologize for the delay in our proceedings and I apologize for my prior absence due to the bill on the floor, but now we will go to our final two witnesses of this panel and of this hearing, and I would now recognize Captain Joseph E. Rogers.

**STATEMENT OF CAPTAIN JOSEPH E. ROGERS, U.S.N.R.
(RETIRED)**

Mr. ROGERS. Mr. Chairman, members of the committee, it is a privilege for me to be before the committee today to testify against this proposal to amend the Constitution to prohibit flag desecration.

As was mentioned, I am a Retired Naval Reserve Captain and Desert Storm veteran. My service in the Navy spanned 27 years. I am opposed to this amendment because it doesn't support the freedom of expression and the right to dissent. These core principles are embodied under our Constitution that I volunteered to support and defend. It would be the ultimate irony for me to place myself in harm's way and for my family to sacrifice to gain another nation's freedom and not to protect freedom here at home. That is why I am here today.

I volunteered to join the Navy at a time in our nation's history when there were enumerable vehement and destructive protests against the Vietnam War. It was my own choice to join since my draft number was around 264. The protests and dissents occurring

at college campuses around the country including my own took many forms. There were flag burnings, draft card burnings, marches and sit-ins. These issues took on even greater significance when during the spring of my first year in college students my own age were killed at anti-war protests at Kent State.

In light of those events, I remember being questioned and questioning myself about how I could morally reconcile my decision to join the military given the dissenting voices and arguments put forth by the anti-war protesters and my peers.

The protesters caused me to reflect upon my decision. I reflected on the loss of tens of thousands of American lives fighting totalitarianism in a far-off land and my decision to participate in the military that carried out the war. It was not easy, but it did help me to think about what I was doing and, more importantly, why.

I only have to look at my own oath to get the answer: I do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic, that I will bear true faith and allegiance to the same—so it is the Constitution that I am sworn to uphold. It would be wrong to take an oath to uphold the Constitution and then to support a reduction in the rights granted under it. That is what I did for my wife and daughter and every other American.

As I look back over my military service, I realize that all of the enemies that I and my colleagues defended against were totalitarian regimes, regimes in which the act of flag-burning or a criticism of the Government would be a crime. When I think of my own career, it was the Cold War, Operation Desert Storm and defense of the Republic of Korea that dominated my service. Whether the Soviet Union, Iraq, or North Korea the issue was always the same—suppression of the freedom and its outward expression and the right to dissent.

I am offended by the thought of anyone burning our flag because it has a very special meaning to me. I know that it must have been painful for Vietnam veterans and their families, especially those who were imprisoned in North Vietnam, to see the flag being burned, to see all the protests, and to hear the dissenting voices. I imagine it was quite disheartening. I remember thinking several times during Operation Desert Storm that I was blessed to have the public support which my countrymen who fought in Vietnam did not have. It was a stark lesson in the impact of expression and political dissent.

While I felt badly for the pain they went through, I realized that the real fundamental truths demanded that it be that way. We had to have freedom of expression even when it hurt because that was the truest test of our dedication to the belief that we have that right.

After college graduation I remember as a young Naval officer standing at attention on the deck of my submarine feeling proud to be an American, proud to be a part of the team that was both keeping America safe and fighting against totalitarianism and its spread during the Cold War, so the pride and honor I feel is not really in the flag per se. It is in the principles that it stands for and people who have defended them.

My pride and admiration is in our country, its people, and its fundamental principles. I am grateful for the many heroes of our country, like the two A-6 pilots who lived in the next hall down from me on Ranger who lost their lives on the first night of Desert Storm. To this day that pride and admiration is what I feel each and every time I stand, face the flag, and come to attention.

I love this country, its people, and what it stands for, but all the sacrifices of those who went before me would be for nought if an amendment were added to the Constitution that cut back on our first amendment rights for the first time in the history of this great nation.

After all, our Nation was born out of political dissent. The last thing I want to give the future generations like my daughter and her children are less rights than I was privileged to have. I fought for others to have such freedoms and am opposed to any actions which would restrict my child and her children from having the same freedoms which I enjoy.

During the Cold War, as I served in the front lines in submarine forces I remember thinking that our adversary was a numerically formidable adversary but that he was also significantly weakened because he had tried to fuse a cross-cultural bond through totalitarianism and I felt then as I do now that our diversity and tolerance for dissent in contrast to what Mr. Hyde said is our strength.

How we achieved that strength was through the exercise of our first amendment right to freedom of expression, no matter how repugnant or offensive that right might be. Achieving that strength has not been easy. It has been a struggle. In fact the struggle personally touched me in the 1960's when my father, a Korean War veteran who is disabled, was called to assist as part of the National Guard to quell riots in Boston, ironically, not far from where the infamous Boston Tea Party occurred centuries before. I was offended by the jeering and threats made on me and other members of the military during the Vietnam War era, just as I am offended today when I see a flag burned. There were days when the protests were so fierce that we were told not to wear our uniforms in public places. As painful as that was, I still believe that those dissenting voices need to be heard no matter how offended I am.

It is not just the majority of the popular voices that need to be heard. This country is unique and special because the minority, the unpopular, the dissenters and the downtrodden also have a voice and are allowed to be heard in whatever way they choose to express themselves as long as they harm no one else.

Free expression, especially the right to dissent with the policies of the Government, is one important element. If not the cornerstone of our form of Government it is greatly enhanced its stability, prosperity and strength. Freedom is what makes the United States of America strong and great and freedom, including the right to dissent is what has kept our democracy going for more than 200 years, and it is that freedom that will continue to keep it strong for my child and the children of all the guys like me who fought for freedom.

I hope and pray that the Constitution that I promised to support and defend is not undermined by cutting back on the freedom of expression that is so important to this great country.

Thank you for the opportunity to speak on this important matter. My family and I consider it a great honor to be here today and have this opportunity to express ourselves freely.

[The prepared statement of Captain Rogers follows:]

PREPARED STATEMENT OF CAPTAIN JOSEPH E. ROGERS, U.S.N.R. (RETIRED)

Mr. Chairman and members of the Committee, it is a privilege for me to appear before this Subcommittee and testify against the proposal to amend the Constitution to prohibit flag desecration.

I am a retired Naval Reserve Captain and a Desert Storm veteran. My service in the Navy spanned more than 27 years. I entered the Naval Service in August, 1969 as a NROTC Midshipman at Marquette University, Milwaukee, Wisconsin. I was commissioned on May 19, 1973 and reported to the Naval Nuclear Power School, Vallejo, California to begin nuclear propulsion training.

In June, 1974, I was assigned to USS ARCHERFISH (SSN678) homeported in Groton, Connecticut. From August, 1974 to November, 1977, I served in ARCHERFISH as a division officer. During this period, the ship participated in two independent operations of great value to the United States for which ARCHERFISH received both the Meritorious and Navy Unit Commendations.

On December 26, 1990, I was recalled to Active Duty in support of Operation Desert Shield/Storm, reporting to Carrier Group Seven onboard USS RANGER (CV61). Our ship participated in the destruction of more than 108 Iraqi craft.

My military awards include the Navy Commendation Medal, two Navy Unit Commendations, two Meritorious Unit Citations, two Battle Efficiency "E", Naval Expeditionary medal, two National Defense Medals, Southwest Asia Service Medal (with two stars), Kuwaiti Liberation Medal, Naval Sea Service Ribbon, three Naval and Marine Corps Overseas awards, and the Armed Forces Reserve Medal.

I am married to the former Catherine Terranova of Revere, Massachusetts. We reside in Richardson, Texas with our daughter, Mary Catherine.

I am opposed to this amendment because it does not support the freedom of expression and the right to dissent. These are core principles embodied under our Constitution that I volunteered to support and defend. It would be the ultimate irony for me to place myself in harms way and for my family to sacrifice to gain other nations freedom and not to protect our freedom here at home. That's why I am here today.

I volunteered to join the Navy at the time in our nation's history that when there were innumerable vehement and destructive protests against the Vietnam War. It was my choice to join since my draft number was around 264. The protests and dissent occurring at college campuses around the country including my own took many forms—there were flag burnings, draft card burnings, marches and sit-ins. These issues took on even greater significance when, during the Spring of my first year of college, students my own age were killed in anti-war protests at Kent State University.

In light of those events, I remember being questioned and questioning myself about how I could morally reconcile my decision to join the military given the dissenting voices and arguments put forth by the anti-war protesters and my peers. The protesters caused me to reflect upon my decision. I reflected on the loss of tens of thousands of American lives fighting totalitarianism in a far off land and my decision to participate in the military that carried out the war.

It was not easy, but it did help me to think about what I was doing and more importantly—why!!

I only had to look at my own oath to get the answer:

"I . . . do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic, that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter, so help me God."

Regardless of the content of my peers' speech and actions regarding the government's policy with respect to Vietnam, ultimately, my responsibility was to support and defend their ability under the First Amendment to the Constitution to freely express their opinion, even if I disagreed with what they were saying.

So, it's the Constitution that I am sworn to uphold. It would be wrong to take an oath to uphold the Constitution and then to support a reduction in the rights granted under it. That's what I did for my wife and daughter and every other American.

As I look back over my service in the military, I realize that all of the enemies that I and my colleagues defended against were totalitarian regimes—regimes in which the act of flag burning or the criticism of the government would be a crime. When I think of my own career—it was the Cold War, Operation Desert Storm and the defense of the Republic of Korea that dominated my service.

Whether the Soviet Union, Iraq or the DPRK, the issue was always the same—suppression of freedom and its outward expression and the right to dissent.

I am offended by the thought of anyone burning our flag because it has special meaning to me.

I know that it must have been painful for Vietnam veterans and their families especially those who were imprisoned in North Vietnam, to see the flag being burned, to see all the protests and to hear the dissenting voices. I imagine it was quite disheartening. I remember thinking several times during Operation Desert Storm as I watched CNN, when I arrived at Cubi Point in the Philippines, first touched US soil at LAX, and eventually homecoming in Dallas that I was blessed to have the public support which my countrymen who fought in Vietnam did not have. It was a stark lesson in the impact of expression and political dissent, while I felt badly for the pain they went through, I realized that the real fundamental truths demanded that it be that way—we had to have freedom of expression when it hurt because that was the truest test of our dedication to the belief that we have that right.

After college graduation, I remember as a young Naval Officer standing at attention on the deck of my submarine looking across the Thames River in Groton Connecticut at taps, feeling proud to be an American—proud to be part of the team that was both keeping America safe and fighting against totalitarianism and its spread during the Cold War. As a reservist, I remember the many drill weekends at quarters in the morning saluting the flag as it was paraded. As a reservist, we knew that we might be recalled to leave our families on short notice and support the active duty forces in places like Korea and the Middle East to fight for the freedom of Americans and other peoples. And I consider this an honor, and I know that my family shared my feelings.

So, the pride and honor I feel is not really in the flag per se. It's in the principles that it stands for and the people who have defended them. My pride and admiration is in our country, its people and its fundamental principles. I am grateful for the many heroes of our country—like the two A-6 pilots who lived in the next hall down from me on USS Ranger who lost their lives the first night of Desert Storm.

To this day, that pride and admiration is what I feel each and every time I stand, face the flag, and come to attention. I love this country, its people, and what it stands for. But all the sacrifices of those who went before me would be for naught, if an amendment were added to the Constitution that cut back on our first amendment rights for the first time in the history of our great nation. After all our nation was born out of political dissent. The last thing that I want to give the future generations, like my daughter and her children, are less rights than I was privileged to have. I fought for others to have such freedoms and I am opposed to any actions which would restrict my child and her children from having that same freedoms I enjoy.

I remember being onboard USS Ranger, during Desert Storm, and thinking how our enemy was generally from a single ethnic, religious and cultural background. I thought about how strange and possible disconcerted they might have felt facing the USA, a powerful adversary composed of diverse races, cultural backgrounds and religions. I could not help but believe that this had an impact. Of course, during the Cold War, on the front lines in the submarine force, I knew that we faced a numerically formidable adversary, but He had tried to fuse a cross-cultural bond through totalitarianism and this would be his major weakness.

I felt then as I do now that our strength is in our diversity. How we achieved that strength was through the exercise of our first amendment right to freedom of expression—no matter how repugnant or offensive the expression might be. Achieving that strength has not been easy—its been a struggle. In fact, the struggle personally touched me in the 1960's when my father was called to assist as part of the National Guard to help quell riots in Boston. Ironically, not far from where the infamous "Boston Tea Party" occurred centuries earlier.

I was offended by the jeering and threats made on members of the military during the Vietnam War era, just as I am offended when I see a flag burned. There were days when the protest were so fierce that we were told not to wear our uniforms in public. As painful as that was, I still believe that those dissenting voices need to be heard no matter how offended I am. It is not just the majority or the popular voices that need to be heard. This country is unique and special because the minor-

ity, the unpopular, the dissenters and the downtrodden, also have a voice and are allowed to be heard in whatever way they choose to express themselves.

Free expression, especially the right to dissent with the policies of the government, is one important element, if not a cornerstone of our form of government that has greatly enhanced its stability, prosperity, and strength of our country.

Freedom is what makes the United States of America strong and great, and freedom, including the right to dissent, is what has kept our democracy going for more than 200 years. And it is freedom that will continue to keep it strong for my child and the children of all the guys like me who fought for freedom.

I hope and pray that the Constitution that I promised to support and defend is not undermined by cutting back on the freedom of expression that is so important to this great country.

Thank you for the opportunity to speak on this important matter. My family and I consider it a great honor to be here today, and have this opportunity to express ourselves freely.

Mr. CANADY. Thank you. Major General Brady.

**STATEMENT OF MAJOR GENERAL PATRICK H. BRADY,
CHAIRMAN, CITIZENS FLAG ALLIANCE**

Mr. BRADY. Yes, sir. Thank you. It is a great honor for me to be able to testify here on behalf of the Citizens Flag Alliance. We are about 20 million strong, have one mission and one mission only and that's to return to the people the right to protect their flag. This is a birthright. It is a right that was taken away from us by the Supreme Court and we want it back.

We are not here to harm the Constitution. We would never do that. It was written in the blood of our comrades. The beauty of the Flag Amendment is that it does not change the Constitution. It restores it. It takes the power over the flag back from the courts, courts who have declared that defecating on the flag is speech, and it returns it to the people who can then protect it if they choose.

The Constitution gives us the right to peacefully protest an action of the country. That is what we are doing. It does not give us the right to violently protest the foundation of our country, and that is what flag-burners are doing.

Our current concerns are not just sentimental. They are very, very practical. Patriotism, fundamental morality, is our lifeblood, yet many fear we are bleeding to death. The great danger of becoming a less patriotic country is that it will result in the spawning of generations who will not care for their country, who will refuse to serve or to sacrifice for America no matter how legitimate and imminent the threat, and tragically they will encourage the same kind of behavior in their children, and therein lies Old Glory's greatest worth—respect for our flag is inspired throughout our history, the values that make us the most respected nation on earth, values vital in inspiration to our children and to our future.

Pure and simple, this is a values issue and the entire debate over values is centered on what we teach our children. Most will agree that flag-burning is wrong, but what it teaches is worse. It teaches our children disrespect. It teaches that the outrageous acts of a minority are more important than the will of the majority. It teaches that our laws need not reflect our values, and it teaches that the courts, not the Congress, not the people, that the courts own the Constitution.

In the movie about the greatest generation, Saving Private Ryan, the simple, haunting, burning question that he had was whether or not he was worth the sacrifices of Captain Miller and those who

saved his life. Those opposed to the Flag Amendment tell us that the freedom to burn the flag makes us worthy of those sacrifices. If Private Ryan's saviors heard that they died on the battlefields of America so that their flag could be burned on America's street corners, they would turn over in their graves. If they could return the would be in the front lines of the battle to recapture our flag. Private Ryan's saviors understood how precious free speech is. They died for it. What they would not understand is that defecating on our flag is speech and neither did the author of speech, James Madison, or his friend, Thomas Jefferson.

Captain Miller's dying words to Private Ryan were "Earn this." Their flag was not earned to be burned.

We have been through one of the most divisive periods of American history. People are distraught and divided over values and they are very distrustful of our leaders. Many believe that the greatest challenge facing the next Congress will be to prove that it is possible for both parties to come together on behalf of the people's well-being. What better proof of such resolve than to begin this Congress with the Flag Amendment, something that showcases unity, something that addressed our values and patriotic concerns, something near and dear to our people, and what better way to answer the pleas of those who for over a year now have begged us to listen to the voice of the people, and that is our plea as well—listen to the people, eighty percent of them, and let them decide.

Enough of the issues that tear us apart. It's time for something that will unite us. The Flag Amendment will do that. It will identify a Congress dedicated to unity and to the will of the people. On hundreds of battlefields our troops were united under Old Glory. They were inspired by the values it embodied and it brought them together for victory. It can do the same for a country and a Congress sadly divided.

It is time to stop wagging the dog and start waving the flag. It is time to save Private Ryan's flag. Thank you, Mr. Chairman.

[The prepared statement of Major General Brady follows:]

PREPARED STATEMENT OF MAJOR GENERAL PATRICK H. BRADY, CHAIRMAN, CITIZENS
FLAG ALLIANCE.

My name is Pat Brady. I am the Chairman of the Board of the Citizens Flag Alliance. We are a coalition of some 138 organizations representing every element of our culture, some 20 million souls. We are non partisan and have one mission and one mission only: to return to the people the right of the people to protect their flag, a right we enjoyed since our birth, a right taken away from us by the Supreme Court. We, the people, 80% of us to include the 49 states who have petitioned congress and 70% of that Congress, want that right back.

But our concerns are not sentimental, they are not about the soiling of a colored fabric, they are about the soiling of the fiber of America. We share with the majority a sincere anxiety that our most serious problems are morally based, and that morality, values and patriotism, which are inseparable, are eroding. This erosion has serious practical consequences. We see it in sexual license, crimes against our neighbors, our land, in our failure to vote, our reluctance to serve and in the level of disrespect we have for our elected officials.

And we see a most visible sign in the decline of patriotism in the legalized desecration of the symbol of patriotism, our flag. Because it is the single symbol of our values, our hope for unity and our respect for each other, the legalized desecration of Old Glory is a major domino in the devaluing of America.

Supreme Court Justice John Harlan spoke about the connection between patriotism and flag desecration when he said, "love both of the common country and the state will diminish in proportion as respect for the flag is weakened." And there can

be no doubt that respect for the flag has weakened. And that is tragic because when love of the country is diminished, so is our country.

Respect for our flag has, throughout our history, inspired the values that our patriots died for, values that make us the most respected nation on earth. Those values are vital and inspirational to our children, and to our future. Old Glory is the greatest training aid we have to instill patriotism in our children.

A patriot is one who loves, supports and serves his country. A patriot will take their love to the highest level—to sacrifice. Their love is the very foundation for the security and prosperity of this country. But we must be a lovable people, if we are to be worthy of sacrifice. Are we? Many gave their lives for the country they served, how many would give their lives again for the country we are becoming?

And this is the most serious danger of becoming a less lovable, a less inspirational, a less patriotic country, that it will result in the spawning of generations who will not care for their country, who will refuse to serve or to sacrifice for America, no matter how legitimate and imminent the threat. And who will encourage the same behavior in their children.

Military weakness will guarantee war and defeat. Moral weakness will guarantee the defeat of democracy. Burning the American flag is the sign of moral weakness in an individual. To legalize the burning of the American flag is the sign of moral weakness in America. When we have lost the symbol of our liberty, how long will it be before we lose the substance of our liberty?

Although our concerns are practical, the flag certainly evokes a sentimental response from many of us. It is a constant reminder of the horrors suffered by so many to bring us the bounty that is America. But it was adopted for practical purposes, it was the glue between the Declaration and the Constitution, it unified 13 very diverse and disparate colonies. It marked our place among the nations of the world. It was the trademark of freedom. Sentiment aside, its greatest worth is practical. The flag ignited the fire in the hearts of our patriots, burning the flag will put that fire out.

I think it is important that when we speak of values, we are speaking to and for our children. Nothing that is said in this debate will change adults or our values, it is too late for us. We are done. It is the children who are forming their values that are important.

The highest form of patriotism is service to our youth. The flag is the greatest training aid we have to teach our children patriotism, respect and citizenship. Pearl Buck, in describing the treasures that are our children, tells how the flag is such a precious symbol to children and so important to their development. The greatest tragedy in flag mutilation is the disrespect it teaches our children, disrespect for the values it embodies, and disrespect to those who have sacrificed for those values. How can we teach our children respect when they are free to burn the symbol of respect? Disrespect is the genesis of hate, it provokes the dissolution of our unity, a unity which has only one symbol—the flag.

We are not here to change the Constitution, we are here to reclaim, to restore the Constitution. We would never do anything to harm the Constitution. Most patriots have not done a lot of speaking and writing about the Constitution, but they have done a lot of working and fighting for it. They are the source of all the freedoms in the Constitution, in fact, of much of the freedoms throughout the world.

It is not the Media who gave us freedom of the press. Our patriots did. It is not the ACLU who gave us freedom of speech. Our patriots did. It is not the campus demonstrators, burning our flag, who contribute to peace. It is the men and women who served and sacrificed under the flag, and who respect the values it embodies, who are our real peace demonstrators. They have demonstrated for peace by contributing to our strength which is the very essence of peace.

They see no threat to any freedom in their efforts to recapture their flag, rather they see the threat in the defilement of the symbol of freedom. They all understand the right to free speech, and would die for that right, what they do not understand is that defecating on the flag is speech.

Speech is the persuading power that moves people to the ballot box, and those elected to the will of the people. Flag burning is the persuading power of the mobs. One should not be allowed to substitute hateful, violent acts, for rational, reasonable speech, to be heard. That is the last resort of those who cannot properly articulate their cause but seek power at any cost. It is certainly cowardice, and terrorism, to take ones venom out on helpless individuals or objects who cannot defend themselves. And it is moral cowardice to ignore such acts.

Flag burning is not speech, it is conduct and neither conduct nor expressive conduct are in the First Amendment. We are strengthened in this conviction by the members of five Supreme Courts in this century who have defended the right of the people to protect their flag. But the greatest authority is the men who framed the

First Amendment and adopted the first flag, Thomas Jefferson and James Madison. These great Americans denounced flag burning as an assault on our sovereignty, a crime, and not in any way speech.

We are amazed at those who say the flag symbolizes the freedom to burn it. Who could seriously believe that anyone died so that the flag could be burned? Our patriots did not give so much of body and soul, on the battlefields of this century, to keep the likes of Hitler, Kim Il Sing and Ho Chi Minh from dishonoring our flag, to see it dishonored on the streets of America.

The beauty of the flag amendment is that it does not change the Constitution. It simply takes the control of the flag away from the courts, who have ruled that defecation on the flag is "speech," and returns that control to the people where it resided since our birth. This amendment restores the Constitution to where it was before the Court amended it in 1989. Another beauty of this amendment, for those who want a statute, is that once the people regain control of the flag it can then be protected only by congressional statute.

Ironically, the only path to a statute is by way of the flag amendment. And that statute will then be subject to congressional vote and presidential veto.

We wonder why some express fear of a slippery slope, that this amendment, if passed, will lead to many more amendments. Why should doing something right cause us to do something wrong? And what is wrong with amending the Constitution if that is the will of the people? The courts have been amending the Constitution for years according to their will without regard to the will of the people.

The people take their responsibilities to the Constitution very seriously. There have been some 11,000 attempts to amend the Constitution. The people have allowed it to happen only 27 times. And in every instance that the people amended the Constitution, it has been improved. The First Amendment, women's voting and the abolition of slavery are examples.

We have a proven record of the non-effect of flag protection on freedom.

We are offended by those who say our effort represents a tyranny of the majority. They would have us believe that a super majority of the people, the states and the Congress are ethically inferior to a small minority who oppose this amendment. The true danger to America is that a minority who were raised on different playing field than the rest of us, most of whom never saw a battlefield, will exercise a tyranny over an indifferent and apathetic majority.

Our veterans spent much of their lives in confrontations with a minority who thought they knew better than the majority what was best. Far too often they forced their will on the majority. In Berlin where a minority build a wall around the majority and then shot those who tried to climb it. In Korea where a minority has enslaved the majority and forced the people to treat them as deities. And in Vietnam where a minority killed millions after we failed to protect them. All of us saw what Hitler and a minority did to Germany and the world.

The founding fathers foresaw the dangers of a tyranny of the minority and that is why they put the amendment clause in the Constitution, to insure that its ownership did not pass to a minority in the courts or the Congress. Thomas Jefferson said, "I readily suppose my opinion is wrong, when opposed by the majority." And, "It is my principle that the will of the majority should always prevail . . ."

The wisdom and morality of the majority is the source of democracy and our protection against tyranny.

We are convinced that our laws should reflect our values. Where in the Constitution does it say that toleration for conduct that the majority sees as evil is necessary for our freedom? Toleration for evil will fill our society with evil. Even those who oppose a flag amendment profess to be offended by flag desecration. Why tolerate it? What possible connection does toleration of evil have to the Constitution and our freedom?

We are dismayed at the insensitivity of those who would trivialize this issue. Many tell their constituents that flag burning is rare, only a handful since 1989. That is not true, there have been hundreds. Over 300 in one cemetery alone. In my state they have flag sitters to protect flags from the coffins of loved ones which are flown on patriotic holidays. This is a most cynical argument. What has the frequency of an event have to do with whether it is right or wrong? It doesn't happen often that the President is threatened, or someone jokes about bombs on an airplane, or shouts fire in a theater, or kills a bald eagle, but these things are wrong and should be unlawful—and they are.

To those who say we are trying to make felons of flag burners, not true. If it were up to me I would handle it as a ticket. Send them to class and attempt to teach them how vital respect is in a society as diverse as we are. Forty-seven states still have statutes against flag desecration and in 40 of those states, flag desecration is

only a misdemeanor offense. The Congress, when it establishes a flag desecration law of the land, will certainly follow the rule of the majority of the States.

The flag protection amendment is a perfect example of democracy at work. It is the majority in America exercising their right to rule, to demonstrate who is in charge here. The Supreme Court, a minority, by one vote, forced the American people, the majority, to accept flag desecration. Those who want the right to protect their flag are not trying to force the minority to accept flag protection, or even to respect the flag. We are trying to force the government to let the people decide, to take the flag out of the hands of a minority and give it back to the majority who can then protect it if they will.

The Constitution gives us the right to peacefully protest an action of the nation. That is what we are doing. It does not give us the right to violently protest the foundation of the nation. That is what the flag burners are doing.

We agree with the President who said that Francis Scott Key's Star Spangled Banner was a treasure and asked all Americans to save it for the ages. We are asking the same for all Star Spangled Banners.

There are great and gifted Americans on both sides of this issue. And learned opinions, but only one fact—the American people want their flag rights returned. Whatever concerns some may have, I pray they will muster the courage to believe that this once they may be wrong, and the American public may be right. I hope they will have the compassion to defer to those great blood donors to our freedom many whose final earthly embrace was in the folds of Old Glory.

The Washington Post

WEDNESDAY, JUNE 14, 1995

Roger Pilon

Desecrating Principle for the Sake of a Symbol

Think what you may of their agenda, the Republicans who were elected to Congress last November have stood, in the main, for less government and more individual liberty. That is why their present push for an amendment to the Constitution that would ban the desecration of the American flag is such an anomaly. The right to burn the flag, to put it in the vernacular, is as American as apple pie.

To listen to the proponents of the amendment, however, one would think that there was an epidemic of flag-burning afoot, or at least a clamor in the land for such an amendment. Yet neither is remotely the case. The issue is a leftover from the dimmest days of the Bush administration, when a desperate grasp for symbols masked an abject want of ideas.

That recent history, in fact, makes the current effort all the more anomalous, because it is precisely the rebirth of ideas—ideas about liberty and limited government—that marks the Republican Congress today. The last decade last November was about little else, and the period since has only deepened that impression.

The principles at stake could not be more simple or clear. Indeed, they are the principles at the core of the American vision. The right of the individual to be free is the right to do what one wishes as short of violating the rights of others. That includes the right to do or say what is popular, for sure. But it includes as well the right to do or say the unpopular. For it is then, when our actions

right. With perfect consistency, in fact, one can condemn the burning of the flag, as most Americans do, while defending the right to burn it. The distinction that enables us to do that—a distinction between rights and values—is at the heart of the inheritance the classical liberals left us. It is that distinction—and our ability to sustain it, through fundamental constitutional law—that marks us as a free people.

Yet the Republicans' amendment would drive a stake through that legacy—amending, for the first time in 200 years, the First Amendment to our Constitution. No one doubts that flag-burning is offensive. If our flag is the symbol of the very principles that constitute us as a people, what could be more offensive than the desecration of that symbol?

What could be more offensive? To ask the question is to answer it, of course. For far more offensive than the desecration of the symbol is the desecration of the principles themselves. In the end, symbols are just that—symbols. They stand for the real thing. When we desecrate the real thing—the principles that our Founders fought to hard to secure and that many since have sacrificed so much to preserve—we lose something far more precious, far more difficult to restore. This Congress, dedicated as it purports to be to liberty and limited government, should not be about such a business.

The writer directs the Center for Constitutional Studies at the Cato Institute.



BY THE COURTESY OF THE NATIONAL FLAG

give offense, that our freedom is put to the test. It is then, precisely, that we learn whether we are free or not.

St. Winston Churchill captured the point nicely when he observed in 1945 that "the United States is a land of free speech. Nowhere is speech freer—not even [in England], where we enthusiastically cultivate it even in its most repulsive forms." In so observing, Churchill was merely

echoing thoughts attributed to Voltaire that he may disapprove of what you say but would defend to the death your right to say it, and the free question of speech ought to be represented but to whom are we to commit the power of doing it? There is all the difference in the world between defending the right to speak and defending the speech that flows from the exercise of that

Mr. CANADY. Thank you very much. Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman. I want to express my thanks to all of the people seated at the table on both sides of this issue.

I started by making comments reflecting that I think this is an issue, although we appear to disagree upon, we actually are all—I really haven't heard anybody who is in dissent about supporting values of America, supporting the principles for which America stands. I think the question becomes how do you support it. Do you support it by defending the principles or do you support it by defending the flag when some people would make their expressions in ways that we do not condone, and I think everybody who has testified has testified with a great deal of integrity and distinction on this point. I don't even know how I could go about asking a question that is likely to move anybody from their position.

Everybody seems to feel their position so vigorously and vehemently, I'd feel almost unworthy to ask a question.

I would say to Mr. Brady that I do not think this is about listening to the majority of the people. I have heard that if you put just about every right that is in the Bill of Rights to a popular vote today, most of them would come up short of a majority, so I don't think you can put some things to a popular vote that our founding fathers thought were so basic coming out of their setting to preserve a nation of freedom.

If you put to a vote whether people dislike flag-burning, I think you would get virtual unanimity on that issue. If you phrased it differently, you would probably get a substantially different result, but those who take the position that the principles in the Bill of Rights are subject to popular vote I think are just wrong and those principles were put there to preserve the rights of the minority against the majority, so I don't think I can apply that criteria, and I am not being—

Mr. BRADY. Well, let me answer you.

Mr. WATT. [continuing]. I am happy to have you answer me.

Mr. BRADY. We got here where we are, we got here because of a majority vote. It was a majority vote on the Supreme Court by 5-to-4, and in a democracy the majority rules. It is the wisdom of the majority of the American people that is our protection against tyranny. If we don't listen to the people, who then? Certainly, they have to understand the issues, they have to be educated on the issues, but once they understand the issues they are going to do the right thing. I think they understand this issue very clearly and they have had 200 years in which they have been allowed to protect their flag.

It has been taken away from them and they just want it back.

Mr. WATT. I am sure Mr. Skaggs will give us the opposite side of that.

Mr. SKAGGS. I don't know that it is the opposite side, Mr. Watt, but—

Mr. WATT. Or different.

Mr. SKAGGS [continuing]. But my memory is that there is polling, and then there is polling on this issue, and while the proponents of this amendment of course want to cite the polling in support of their position, I have certainly seen polls which have phrased the

question not "Do you want a Constitutional amendment so that the flag can be protected?" but "Are you willing to see first amendment freedoms compromised so that the flag can be protected?"

The results are very different, so let's not be seduced by polling data when we are amending the Constitution.

Mr. WATT. I will just close, Mr. Chairman, by saying that I don't think you can subject this to a poll. I don't think you can subject any of the basic rights in the Bill of Rights to a poll. The reason they are in the Bill of Rights is because they are so basic to our country and our system of government that we have made a decision not to make them subject to the change in public opinion, so I yield back.

I thank all of you for participating and making this a quite impressive hearing. Thank you.

Mr. CANADY. Thank you, Mr. Watt—and I want to express my agreement with a great deal of what you have said, Mr. Watt—not everything that you have said. We do have a fundamental difference of opinion ultimately on the amendment that is before the committee, as our votes in the past would indicate, but I agree with you that this is not an issue about the patriotism of the opponents of the amendment. It would be a mistake to call into question the patriotism of those who may for a variety of reasons, which I believe are misguided, call—oppose this amendment.

I believe that people of principle can oppose this amendment. Again I disagree with where they come down and I think they are making a mistake but I think it would be wrong to question their patriotism.

I also however think it is wrong to question the motives of those who support this amendment. It has been suggested that this is a political stunt, and I think that sort of claim really does not show adequate respect for the very sincere and heartfelt feelings that have motivated this movement.

This is a grassroots effort. This didn't really start here in the Congress. Efforts were made to in the Congress, but we are here today because of an effort at the grassroots throughout this country that led to 49 State legislatures calling on Congress to address this issue. Now that is how we came to this point, and most of the people who have been involved in that effort are not politicians and don't have anything at stake in this other than their desire to see the flag of this country protected, as it has been throughout most of the history of this country until the recent decisions of the Supreme Court.

Let me also agree with you, Mr. Watt, in your statement that the Bill of Rights is not something that should be subject to popular vote. It's my view that the decision of the Court on this issue is not in line with the Bill of Rights. I think the Court made a mistake, but I agree with you that the Bill of Rights is in place to protect the rights of people who may be unpopular at the moment, although initially I believe the Bill of Rights was understood primarily as a protection of the people in the States against the Federal Government.

We have had a little different understanding of that that has developed in light of the 14th amendment, which is understandable, but I do also believe that there is a role for popular sentiment and

the people in shaping our Constitution. After all, the Constitution does provide an amendment process. We talked about that or I made reference to that in my initial statement, and that is an important part of the Constitution, and I think we all would recognize the important role that the amendatory process has played throughout the history of our country.

There have been amendments to the Constitution that I am sure in addition to the Bill of Rights, which were obviously amendments to the Constitution, subsequent to that, in the 13th, 14th, 15th amendments and others, where the popular will was exercised in some ways, in some instances to curb what had been the legal rights of some people in the institution of slavery. That needed to be done. That was essential, so I think we need to put all of this in perspective.

Finally, I just want to make a point, as my time is fading here, that what we are talking about here is not something that prevents anyone from saying anything. I made that point again earlier. I will make it again. I believe that under first amendment jurisprudence we don't have a rule that is absolute that in all circumstances people can say anything or do anything that has an expressive element in it and what we have here is conduct in desecrating the flag that does have or can have an expressive element in it.

I think the Chief Justice was quite right when he described it as more like an inarticulate grunt or roar than speech, but it does have at least a modicum of an expressive element, and I will conceded that.

But there are other sorts of conduct that have an expressive element in them that we don't allow simply because someone chooses to use that conduct as a means of expression. Various sorts of indecent acts may be chosen by particular individuals as their way of most effectively expressing what they want to express, but that doesn't mean that they can engage in that indecent conduct. There are other avenues open to them.

I think that is essentially what we have here. Any idea can be expressed, just this unique symbol cannot be physically desecrated under the legislation that would flow from this amendment. I think that is entirely consistent with the history of the first amendment. It is entirely consistent with what, and I am sure this has been mentioned already, what some of the greatest defenders of civil liberties in this country have said. We have Chief Justice Earl Warren, Abe Fortas, and Justice Hugo Black who had made clear in various statements of theirs that protecting the flag from desecration is not inconsistent with the first amendment, so I just come down differently than the majority on the Court did, on this. While I respect the other side of this issue, I think that the overwhelming weight of the argument is on the side of passing this amendment and restoring protection to our flag. With that I see that my time has expired.

I want to thank all of you for taking the time to be here. I won't take any questions. I think we have really gone over all the questions over the course of the last two Congresses, but we thank you for being here. You have made an important contribution to our ongoing effort, and the subcommittee will now stand adjourned—

Mr. WATT. Mr. Chairman?

Mr. CANADY. [continuing]. Oh, I'm sorry. Mr. Watt is recognized before we adjourn.

Mr. WATT. Let me make two unanimous consent requests.

I ask unanimous consent to submit for the record a statement of Keith A. Kreul, the past National Commander of the American Legion in opposition to the proposed amendment and a statement of Roger Pilon, a Ph.D. at the B. Kenneth Simon Chair in Constitutional Studies at the Cato Institute in opposition to the proposed amendment.

[The information referred to follows:]

PREPARED STATEMENT OF KEITH A. KREUL, THE PAST NATIONAL COMMANDER OF THE AMERICAN LEGION.

With the consideration of H.J. Res. 33 again in the 106th Congress, I provide this statement in opposition to the resolution. This amendment will neither protect the flag nor promote true patriotism. It is a radical approach to a near nonexistent dilemma akin to atom bombing a sleeping city because a felon may be in the vicinity.

I am a U.S. Army veteran who proudly served my country, and was privileged to subsequently serve as National Commander of The American Legion. The preamble of The American Legion states that "right is the master of might." With that motto in my heart, I urge the House to reject the amendment, to say "no" to the misguided organized campaign that would put the flag above the Constitution. The flag is a beautiful and inspiring banner representing freedom and justice for all Americans. It represents those beliefs, credos and tenets that are outlined by the Constitution of the United States of America.

Freely displayed, our flag can be protected only by us, the people. Each citizen can gaze upon it, and it can mean what our heartfelt patriotic beliefs tell us individually. Government "protection" of a nation's banner only invites scorn upon it. A patriot cannot be created by legislation. Patriotism must be nurtured in the family and educational process. It must come from the heartfelt emotion of true beliefs, credos and tenets.

Much was made of a case from my home state of Wisconsin, where the State Supreme Court rejected Wisconsin's flag protection law as vague and violating the U.S. Constitution's guarantee of free speech. Rather than reinforce the call for a constitutional amendment, the opinion clearly demonstrates that the flag can be protected without resorting to amending the First Amendment's guarantee of free speech.

The case stems from the despicable conduct of a young man from Appleton, Wisconsin, who protested by stealing and defecating on a flag in 1996. He was found guilty on theft and vandalism charges for which he received a nine months jail term, was charged the cost of restitution, and was required to do 350 hours of community service. Justice was rendered. It was the charge under the State's flag protection law that the Court rejected, and rightly so. We must keep our perspective. When properly charged for illegal conduct, justice can be, and is rendered. A constitutional amendment that prohibits physical desecration would result in an unnecessary and dangerous precedent. Desecration implies deity to the banner, it is not a "golden calf."

Yes, the Constitution can be amended. But will an amendment that is in obvious conflict with the First Amendment accomplish a purpose, or will it bring further confusion and discontent, diminishing the beauty the flag has today as it hangs free, revered by us, the people, not ordered by Government edict?

Our nation was not founded on devotion to symbolic idols, but on principles, beliefs and ideals expressed in the Constitution and its Bill of Rights. American veterans who have protected our banner in battle have not done so to protect a "golden calf." Instead, they carried the banner forward with reverence for what it represents—our beliefs and freedom for all. Therein lies the beauty of our flag.

The proposed amendment would stain the image of our banner, as it would no longer wave free, unprotected by Government and freely held high by the citizens of the United States of America. Are we now, after 209 successful and glorious years, going to knuckle under to the pressure of modern lobbying techniques to pursue pseudo patriotism? Organizations exploiting high tech lobbying, spending millions pressuring lawmakers and pandering to a false patriotism, should rethink their priorities and not succumb to the temptation of this "golden calf."

We must not delegate to government our responsibility of citizenship lest we endanger our most precious freedoms. Teaching in the home and in our schools the principles evident in our Constitution and Bill of Rights requires responsibility and sacrifice. That energy enhances pride in our heritage. Respect for our beautiful flag can only come from the hearts of the people. Attempts to bestow honor by government decree upon the flag are idle myths and must not prevail.

Thank you for this opportunity to express my views.

Keith A. Kreul

PREPARED STATEMENT OF ROGER PILON, PH.D., J.D., WASHINGTON DC

Mr. Chairman, distinguished members of the subcommittee:

My name is Roger Pilon. I am director of the Cato Institute's Center for Constitutional Studies.

I want to begin by thanking Congressman Watt for his kind invitation to testify before the Subcommittee today on "H.J. Res. 33: Proposing an Amendment to the Constitution of the United States Authorizing the Congress to Prohibit the Physical Desecration of the Flag of the United States." Unfortunately, the invitation came after I was committed to speak out of town and so I will have to submit this written testimony for the record.

In the past I have had the pleasure of working with Chairman Hyde of the full Committee and Chairman Canady of the Subcommittee on several issues, and I look forward to working with them again in the future on others. On the issue before the Subcommittee today, however, I am afraid I must demur, taking a position opposite that of the chairmen and many on this Subcommittee. In fact, because this issue separates me from so many with whom I normally join hands, I sense a special burden to show why I believe this proposed amendment is unwise—indeed, is fundamentally mistaken.

Let me begin to discharge that burden by making clear from the outset what should be beyond any doubt, namely, that I do not write to defend those who would desecrate the flag of the United States. I dare say, in fact, that my contempt for such action is equal to that of any member of this Subcommittee. For the flag is not simply the symbol of America; more deeply, it is the symbol of the principles on which this nation rests. Those who would desecrate the flag are thus guilty, at bottom, of desecrating our principles, which is why we find their acts so offensive. Ironically, however, it is those very principles that protect such acts—and restrain the rest of us in the process.

In a word, therefore, I am here not to defend flag desecration but to defend the right to desecrate the flag, offensive as the exercise of that right may be to so many Americans. That position may strike some as contradictory. It is not. In fact, there is all the difference in the world between defending the right to desecrate the flag and defending flag desecration itself. It is the difference between a free and an unfree society. This amendment, as it tries to shield us from offensive behavior, gives rise to even greater offense. By offending our very principles, it undermines its essential purpose, making us all less free.

Let me plumb those issues a bit more deeply by noting, first, that flag desecration of a kind that this amendment would authorize Congress to prohibit is political expression and, second, that political expression is precisely what the Framers wanted most to protect when they drafted the First Amendment. In a pair of cases decided in 1989 and 1990—involving first a state, then a federal statute—the United States Supreme Court said as much, which is why those who want to prohibit people from engaging in such acts have resorted to a constitutional amendment—an amendment that would, for the first time in over 200 years, amend the First Amendment. That alone should give pause.

But it is not the First Amendment alone that protects the rights of political expression. Even before the Bill of Rights was ratified, two years after the Constitution itself was ratified, citizens were protected against overweening federal power by a simple yet profound expedient—the doctrine of enumerated powers. In a word, there was simply no power enumerated in the Constitution through which the federal government might abridge political expression. Arguing against the addition of a Bill of Rights in *Federalist* 84, Alexander Hamilton put the point well: "Why declare that things shall not be done [by the federal government] which there is no power to do?" This amendment would expand federal power in a way the Framers plainly contemplated—and rejected.

It is crucial, however, to understand precisely why the Framers wanted to protect political expression. To be sure, they thought such expression was essential to the workings of a free society: democracy works, after all, only when people are free to

participate in the processes through which they govern themselves. But it was not a concern for good consequences alone that drove the Framers: more deeply, they were concerned about the simple matter of protecting rights, whatever the consequences of doing so. The protection of our rights is tested, however, not when what we do or say is popular but when it is unpopular. Stated most starkly, a free society is tested by the way it protects the rights of its least popular members.

Sir Winston Churchill captured well that essential feature of our system when he observed in 1945 that "the United States is a land of free speech. Nowhere is speech freer—not even [in England], where we sedulously cultivate it even in its most repulsive forms." In so observing, Churchill was merely echoing thoughts attributed to Voltaire, that he may disapprove of what you say but would defend to the death your right to say it, and the ironic question of Benjamin Franklin: "Abuses of the freedom of speech ought to be repressed; but to whom are we to commit the power of doing it?"

When so many for so long have understood the principles at issue today, how can this Congress so lightly abandon those principles? It is said by some that the flag is a special case, a unique symbol. That claim may be true, but it does not go to the principle of the matter: in a free society, individuals have a right to express themselves, even in offensive ways. Once we bar such expression, however, Franklin's question will immediately be upon us. What is more, we will soon find that the flag is not unique, that the Bible and much else will next be in line for special protection.

It is said also that the flag is special because men have fought and died for it. Let me suggest in response that men have fought and died not for the flag but for the principles it represents. People give their lives for principles, not for symbols. When we dishonor those principles, to protect their symbol, we dishonor the men who died to preserve them. That is not a business this Congress should be about. We owe it to those men, men who have made the ultimate sacrifice, to resist the pressures of the moment so that we may preserve the principles of the ages.

Mr. CANADY. Without objection, and without objection the full written statements of all of the witnesses who have testified today will be made a permanent part of the record.

The subcommittee stands adjourned.

[Whereupon, at 5:39 p.m., the subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF JAMES D. STATON, CHIEF MASTER SERGEANT, USAF (RET.),
EXECUTIVE DIRECTOR, AIR FORCE SERGENTS ASSOCIATION

March 23, 1999 Mr. Chairman and distinguished committee members, numerous polls in recent times have shown that over 80 percent of the American people say that they should have the right to decide the question of flag protection through the constitutional amendment process. In fact, all but one state have passed memorializing resolutions asking Congress to send the flag protection amendment question to the states. House Joint Resolution 33 would give the American people the opportunity they desire to protect their flag through law. H.J. Res. 33 would send to the people a very simple article: "The Congress shall have power to prohibit the physical desecration of the flag of the United States." The 150,000 members of the Air Force Sergeants Association urge you to support this resolution. AFSA represents the millions of active duty and retired enlisted Air Force, Air Force Reserve, and Air National Guard members and their families. These Americans, perhaps more than any others, have a vested interest in that they put their lives on the line under the banner of this sacred symbol of greatness and sovereignty.

All members of the 106th Congress should support this resolution in order to put this important decision in the hands of the people. If the congressional representatives truly represent the will of the people, there should be no delay in acting upon the wishes of the people by allowing them to rule on this question. The personal feelings and opinions of elected representatives on this issue should be subordinated to opinions held by those to whom the elected officials are responsible—those who own the process. Our members have strongly communicated their concern over the need to protect the flag and, at the same time, to have a role in deciding the laws governing that protection.

For enlisted military members, whose work is characterized by dedicated sacrifice, the flag is a reminder of why they serve. For those stationed overseas, it is a symbol of America, seen every day. For all military members, the flag represents the principles for which they are prepared to sacrifice. Supreme Court Justice John Paul Stevens once wrote:

"A country's flag is a symbol of more than nationhood and national unity. It also signifies the ideas that characterize the society that has chosen that emblem as well as the special history that has animated the growth and power of those ideas . . . So, too, the American flag is more than a proud symbol of the courage, the determination, and the gifts of a nation that transformed 13 fledgling colonies into a world power. It is a symbol of freedom, of equal opportunity, of religious tolerance, and of good will for other people who share our aspirations."

Military members serve so that they can protect this country, putting their lives on the line if necessary, and they revere our nation's most visible symbol—Old Glory. It is the one hallowed symbol all patriots hold sacred. Most importantly, the flag plays a central role in ceremonies that honor those who have fought, suffered and died. They know full well that this very flag may drape their coffins as a result of their unselfish service. Denying protection and, thereby allowing desecration, of this important symbol of sacrifice insults the memories of those who are honored in these ceremonies.

The American people, especially those in the military, deserve the opportunity to make the decision if they want to put flag protection into the law. Through their sacrifice and dedication, those who have served have earned your support in giving them the ability to make this decision.

Mr. Chairman and committee members, we urge your full support of H.J. Res. 33. Some questions of governance and law are of such importance to a people that they deserve the to speak directly those issues. This one such question. We thank you for this opportunity to present our views on this important matter. As always, AFSA is ready to support you on matters of mutual concern.

PREPARED STATEMENT OF HAROLD L. "BUTCH" MILLER, NATIONAL COMMANDER, THE AMERICAN LEGION

Mr. Chairman and Members of the Subcommittee, I thank you for the opportunity to present the views of The American Legion to this distinguished body. The American Legion is adamant in its support of House Joint Resolution (H.J. Res.) 33, the flag protection amendment. This constitutional amendment simply reads: *The Congress shall have power to prohibit the physical desecration of the flag of the United States.*

The American Legion would like to publicly thank Representatives Cunningham and Murtha for introducing H.J. Res. 33 in the 106th Congress. Our thanks, also to the 270 plus cosponsors. Currently, there are over 300 Members of this Chamber who have voted for or plan to vote for this amendment.

The American Legion's quest for this constitutional amendment began shortly after the United States Supreme Court ruled, in a 5-4 decision in *Texas v. Johnson* 491 U.S. 397 (1989). The Supreme Court decided that the physical desecration of the flag of the United States of America, as a means of public protest, is an act of free expression protected by the First Amendment to the United States Constitution. At the time of that ruling, 48 States and the District of Columbia had flag protection statutes. Congress tried to enact a federal statute (18 U.S.C. Section 700), but in 1990, the Supreme Court ruling, again in a 5-4 decision in *United States v. Eichman*, 496 U.S. 310 (1990), struck down the Flag Protection Act of 1989 as inconsistent with free expression protected by the First Amendment.

The flag protection amendment does not limit free speech in any way. The proposed amendment would not prevent anyone from saying or writing anything, but then again the First Amendment is not absolute. Prohibiting flag desecration had been viewed as compatible with both the letter and spirit of the First Amendment up until these two decisions. Such leading proponents of individual rights as former Supreme Court Chief Justice Earl Warren, Justice Abe Fortas, and Justice Hugo Black each has opined that the nation could, consistent with the First Amendment, prosecute physical desecration of the flag.

These two decisions by the Supreme Court left the American people with only one option to restore flag protection statutes: the amendment process as outlined in Article V of the Constitution. The American Legion opposes the convening of a Constitutional Convention; therefore, continues to seek congressional approval and the State ratification process.

From the very beginning of this historic campaign, The American Legion recognized that this issue was a genuine national grassroots concern and not just a "veterans" issue. To help demonstrate the national support for reversing the Supreme Court's ruling, The American Legion went to work in the local community. Before long, petitions in support of a constitutional amendment began pouring into The American Legion's National Headquarters. The American Legion delivered to Capitol Hill over 1 million signatures from across the country. Then memorial resolutions from State legislatures asking Congress to send a constitutional amendment to them for ratification began to pass and were sent to lawmakers for action. Eventually, forty-nine State legislatures passed these memorial resolutions.

The American Legion joined forces with other like-minded organizations to form the Citizens Flag Alliance (CFA) to pursue a constitutional amendment to prohibit acts of physical desecration of the American flag. That small group now has 138 diverse organizations. The vast majority of the organizations are active and community-based. Some of them have special flag education programs specifically to educate our children. Their effort during this campaign has helped to sustain an unprecedented national grassroots movement to protect Old Glory. Literally, tens of millions of cards, letters, emails, faxes, telephone calls, and personal visits have occurred between members of the CFA and their elected officials at the state and national levels.

Meanwhile here in Congress, the amendment has passed in the House by over 310 votes twice, yet fell short in the 104th Congress in the Senate by just three votes. Clearly, no other constitutional amendment has this kind of support and commitment. Needless to say, there was a great deal of disappointment when no vote was taken in the Senate last Congress, but I have recently talked with the Senate leadership and have been reassured a vote will take place in the 106th Congress.

Mr. Chairman and Members of the Subcommittee, this is not an issue about patriotism. There are very patriotic people on both sides of this issue. This is not about partisan politics. There is bipartisan support for this issue. This is not about restricting free speech. No where in the Constitution is absolute freedom of speech or expression guaranteed. This is not about amending the Bill of Rights or the First Amendment. This is a stand-alone constitutional amendment. This issue goes to the very core of the Constitution; a republic form of government of the people, by the people, and for the people.

Throughout the entire debate on this legislation, The American Legion believes one point seems to have been overlooked by lawmakers and journalists; the true authors of the Constitution are We, the people. America's Constitution is a living document. The Founding Fathers provided us with the basic framework, but it has been through a cooperative effort to create a more perfect document. However, the final element, and most important, is the State ratification process; We, the people. This assures that any change to the fundamental document is, in fact, the will of the governed.

The flag of the United States is a product of Congress, not the Constitution. Congress made the flag our national banner (authorized by the Continental Congress), created the Flag Code (36 U.S.C. Sections 170-179); and the Flag Protection Act (18 U.S.C. Section 700). At the time of *Texas v. Johnson*, 48 States were enforcing flag protection statutes. The flag of the United States is the accepted symbol of the American people and is readily recognized internationally. From the very beginning of this country, the flag continues to serve as an instrument and embodiment of our national sovereignty. Protecting the flag from acts of physical desecration is not suppression of speech, but is an incident of sovereignty. This amendment would include the flag in the Nation's most fundamental document.

The three branches of government serve specific functions to provide for the necessary checks and balances. The legislative branch writes the laws, the judicial branch interprets the laws, and the executive branch enforces the laws. In the case of the Flag Protection Act, the judicial branch found nothing in the Constitution that provided Congress the authority to prohibit acts of physical desecration; therefore, five justices interpreted the First Amendment differently than did the other four justices. The interpretation of just one justice played the pivotal role. There is no clear black and white answer whether physical desecration to the flag of the United States is right or wrong, just an interpretation.

When ratified, the flag amendment clarifies that Congress can prohibit acts of physical desecration. Any federal statute concerning physical desecration of the flag of the United States passed by Congress must still travel the exact same legislative process as any other measure. The federal statute would be subject to presidential veto, as well as, judicial review. The checks and balances will still be in place.

Mr. Chairman and Members of the Subcommittee, former Justice Hugo Black, perhaps the leading exponent of First Amendment freedoms, stated: "it passes my belief that anything in the Federal Constitution bars . . . making the deliberate burning of the American flag an offense." *Street v. New York*, 394 U.S. 576, 610 (1969). Justice Abe Fortas added his views in that decision: "The flag is a special kind of personality. Its use is traditionally and universally subject to special rules and regulations . . . The States and the Federal Government have the power to protect the flag from acts of desecration." *Street v. New York*, 394 U.S. 615-617 (1969). Finally, former Chief Justice Earl Warren said: "I believe that the States and the Federal Government do have power to protect the flag from acts of desecration and disgrace." *Street v. New York*, 394 U.S. 605 (1969).

Those are the words from First Amendment purists. Flag desecration is expressive conduct as distinguished from actual speech. Expressive conduct is afforded a lower level of constitutional protection than actual speech. A federal statute passed under the proposed constitutional amendment will not make it unlawful to say anything, no matter how repugnant, insensitive, or offensive the statement might be to the audience. What will be proscribed, consistent with the First Amendment, is certain conduct.

I would like to turn to the views of the four dissenting Supreme Court Justices in *Texas v. Johnson* and *United States v. Eichman*: Chief Justice Rehnquist and Justices O'Connor, Stevens, and White. In their dissenting in *United States v. Eichman*, they reasoned that the Federal Government has a legitimate interest in protecting the intrinsic value of the American flag. The prohibition does not entail any interference with the speaker's freedom to express ideas by other means. The societal interest in preserving the symbolic value of the flag outweighs the interest in an individual choosing to desecrate the flag as the most effective method of expressing views.

Historically, the Supreme Court has upheld the Federal Government not only may regulate the content of speech, but sometimes it should do so in order to protect the system of freedom of speech in general. Speech can be curtailed if such speech is likely to incite an immediate, violent response *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), *Feiner v. New York*, 340 U.S. 315 (1951); threatens certain tangible, diffuse harm *Miller v. California*, 413 U.S. 15 (1973); or criticizes official conduct of a public official *New York Times v. Sullivan*, 367 U.S. 254, 270 (1964). The Supreme Court has said such speech is uno essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chapfinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

Mr. Chairman and Members of the Subcommittee, The American Legion is a community-based, nonprofit, federally chartered veterans service organization. Founded in 1919, immediately after the war to end all wars, The American Legion is a group of wartime veterans committed to service to the community, state and Nation. Many Members of Congress and their staff members gained an early interest in serving their country by participating in The American Legion's programs of Boys State and Boys Nation or The American Legion Auxiliary's versions, Girls State and Girls Nation. President Clinton has credited his participation in Boys State and Boys Nation as the turning point in his young political career. Boys Nation Class of 1963 provided classmates, young Bill Clinton and Jim Ramstad, an opportunity to shake hands with former President Kennedy.

Traditionally, American Legion meetings begin with a salute to the flag of the United States, the Pledge of Allegiance, and the reciting of the Preamble to the Constitution of The American Legion, which starts; "*For God and Countly, we associate ourselves together for the following purposes: to uphold and defend the Constitution of the United States of America . . .*" As active-duty servicemembers we took the same oath of enlistment which includes the same mandate " . . . to uphold and defend the Constitution . . . "

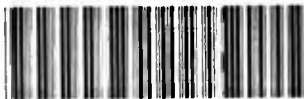
That means the entire Constitution, not just selected parts. Opponents of this amendment seem to forget one element of the First Amendment that deals with the freedom of a "redress of grievances" by its citizens. Another key component is Article V, the amendment process. The wisdom of the Founding Fathers is evident with a laborious amendment process for a living document. They knew the Constitution was a good starting point that would be improved over time. As long as the Constitution remains a living document, subject to change by the governed, America will prosper, but the moment the voice of the electorate is ignored by the elected, its future is in peril.

The American people are represented in every strand of fabric in Old Glory. The flag patch on the shoulder of military personnel represents the extended helping hands of Americans giving comfort to the suppressed. The flag flying at U.S. embassies around the world assures peoples of those nations that America stands as a beacon of hope for lasting peace. The flag on a casket pays tribute to the sacrifices made, the hardships endured, and conveys to all the thanks of a grateful Nation.

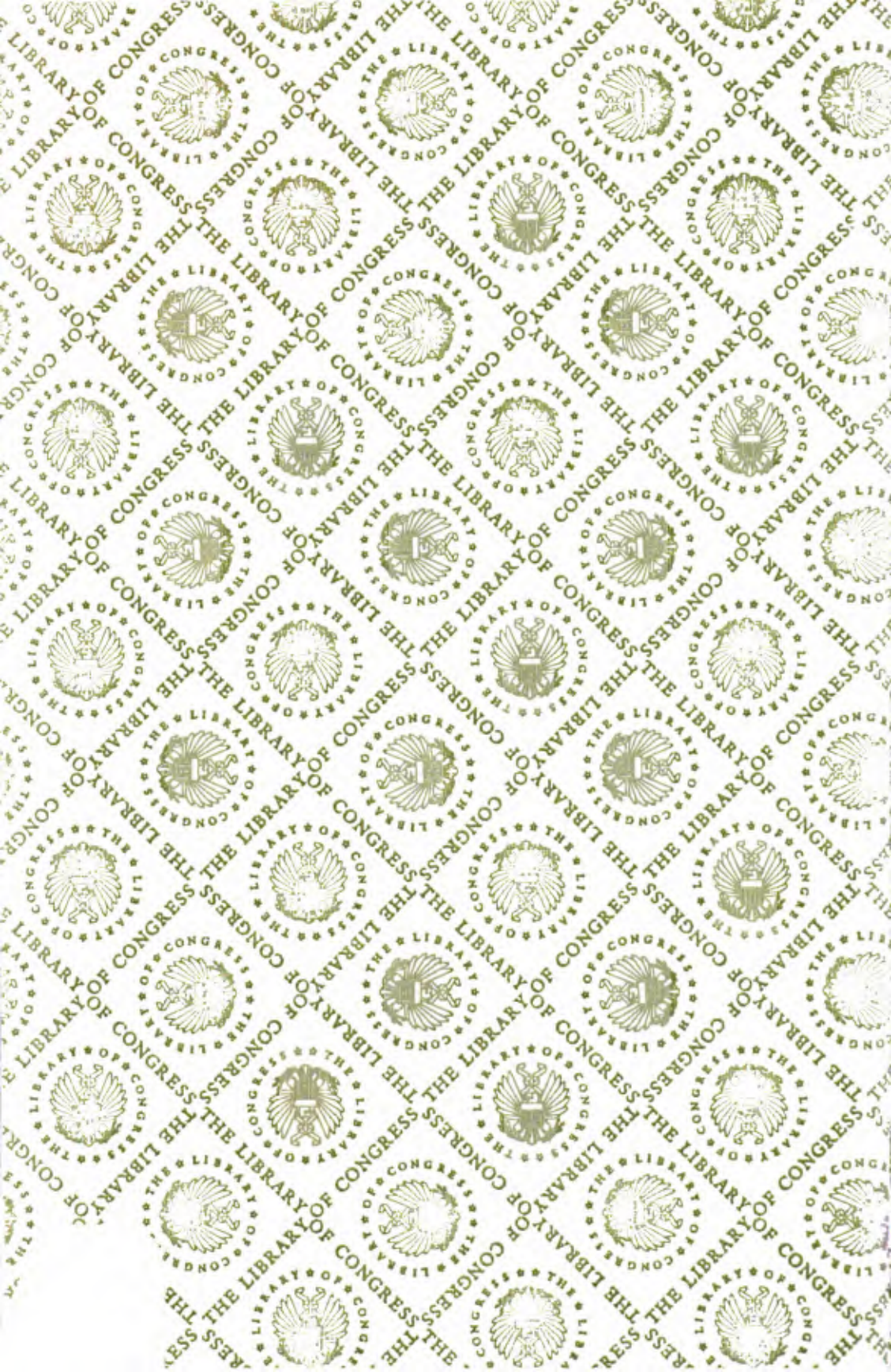
Mr. Chairman and Members of the Subcommittee, that concludes my testimony.



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